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In The
# Supreme Court of the United States

HOPEMAN BROTHERS, INC.,
*Petitioner,*

v.

CLARENCE L. ACKER, JR., *et al.*,
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Supreme Court of Virginia erred in holding that the Due Process Clause of the Fourteenth Amendment was not a "clear and specific legal right" which can be and ought to be enforced by a state trial judge, and thus, contrary to the decisions of other federal and state courts, implicitly held that the Due Process Clause permits the aggregation for a mass liability trial of 1300 disparate product-liability asbestos claims without any inquiry into the commonality of those claims and the prejudice that would result from such an extraordinary undertaking.

## PARTIES TO THE PROCEEDINGS

Petitioner is Hopeman Brothers, Inc. Respondents are Clarence L. Acker, Jr., and all other plaintiffs in the case styled *In re: All Asbestos Cases*, At Law No. CL99-20000-00, In the Circuit Court of the City of Newport News, Virginia, as well as the Honorable Robert W. Curran in his capacity as Chief Judge of the Circuit Court of the City of Newport News. There are approximately 1296 plaintiffs in At Law No. CL99-20000-00, and no caption in the proceeding identifies those individuals. Hopeman Brothers has lodged separately with the Court an unofficial list of the 1296 plaintiffs subject to the challenged trial orders. (App. L).

Petitioners also have lodged separately with the Court an unofficial list of the ten remaining defendants subject to the challenged trial orders (App. M).

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Hopeman Brothers, Inc. ("Hopeman Brothers") is privately held, and no publicly held companies own shares of Hopeman Brothers' stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

## OPINIONS AND JUDGMENT BELOW

The opinion of the Supreme Court of Virginia (App. A) will be reported in S.E.2d, but is not yet reported. It can be found at 2002 WL 31094068. The Orders of the Trial Court (App. C-G) are unreported.

## JURISDICTION

The opinion and order of the Supreme Court of Virginia denying petitioner's petition for writ of mandamus was entered on September 18, 2002. This Court has jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

## STATEMENT OF THE CASE

This petition presents questions almost identical to those currently on Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, in *Mobil Corporation and Honeywell International, Inc. v. Bruce W. Adkins, et al.*, No. 02-132 ("the West Virginia Petition"). The Virginia courts, like those of West Virginia, have abrogated the fundamental constitutional rights of the litigants before them in the interest of perceived efficiency, by consolidating 1300 unrelated asbestos cases for a single mass trial and liability determination. As is becoming a disturbing trend in this

country, these states have singled out asbestos litigation as a special branch of the law in which customary rights and fundamental legal principles do not apply. These misguided attempts to administer overburdened asbestos dockets have resulted in a trial process that tramples on the guarantees in the Due Process Clause.

The Supreme Court of Virginia has approved a mass trial of 1296 product-liability cases alleging exposure to asbestos that will begin on October 22, 2002 - one month after the West Virginia consolidated trial is scheduled to begin. As in West Virginia, the Trial Court has made no findings and conducted no proceedings to ensure that the cases are sufficiently "common" to be consolidated for trial. Plaintiffs have not adduced any evidence regarding commonality and the Trial Court has virtually cutoff discovery[1] from individual plaintiffs, stating that such information is irrelevant to the determination of liability and the appropriateness of this consolidation. The Trial Court's severe restrictions on discovery make it impossible for Hopeman Brothers to defend itself in the manner that any civil litigant has the right to when facing potential liability for alleged personal injury. This consolidation essentially amounts to a trial by ambush.

The limited facts that can be gleaned from plaintiffs' complaints show that these cases are not sufficiently common to be consolidated in accordance with constitutional principles and without prejudicing defendants. The only commonality among the 1300 plaintiffs is that all are represented by the same counsel and all allegedly worked at some point at the Newport News

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1 The Trial Court halted discovery from individual plaintiffs after less than two dozen of the 1296 plaintiffs had been deposed and only 75 plaintiffs had responded to interrogatories.

Shipyard and Drydock Company ("the Shipyard").[2] Plaintiffs allege exposure to asbestos at dozens of other jobsites in addition to the Shipyard. Some allege minimal exposure at the Shipyard, with substantial exposure at other locations. The plaintiffs worked in dozens of different occupations (from security guards and store clerks to welders and insulators), some worked directly with asbestos-containing products while others were simply by-standers. They worked during markedly different time periods (from the 1930s to the 1990s), and for various exposure periods (from as little as three months to more than five decades). The plaintiffs, some living and some dead, allege a variety of different diseases, including mesothelioma, lung cancer, colon cancer, asbestosis, and pleural plaque disease.

The consolidation originally involved claims against more than 35 defendants, including manufacturers, suppliers, distributors, independent contractors, and insurance carriers. As evidence of the nation's on-going "asbestos-litigation crisis," at least fifteen of the original defendants have filed for bankruptcy since this litigation began – one in the last week. Many defendants have settled these cases rather than face the "Armageddon scenario" posed by this mass consolidation; at present, only nine defendants remain.

Like the West Virginia consolidation, these cases have been consolidated pursuant to the purported authority granted to the Trial Court by state law – in this case Virginia Code § 8.01-374.1. (App. K). Like in West Virginia, there will be no inquiry into whether this adjudication affords

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[2] Plaintiffs' counsel asserts that all plaintiffs in this consolidation worked at the Shipyard at some point during their careers. Based on the allegations of plaintiffs' complaints, however, it appears that several plaintiffs did not, in fact, work at the Shipyard. Because the Trial Court has prevented individual discovery from plaintiffs, Hopeman Brothers has been unable to investigate plaintiffs' counsel's assertion.

defendants a fair opportunity - before a jury determines whether the defendants are liable for plaintiffs' alleged injuries - to defend themselves or protect their right to a fair trial. The defendants will have no opportunity to show that plaintiffs' claims are unrelated, that the claims against them have no logical relationship with the claims made against other defendants, or that plaintiffs suffer from no compensable injury. The application of Virginia Code § 8.01-374.1 in this case exalts speed and efficiency over fundamental fairness.

The constitutional problems with this consolidation may be worse that those set forth in the West Virginia Petition. That is so because here the Trial Court ordered the mass consolidation despite having found as a matter of fact that the consolidation *would* prejudice the rights of the parties to a fair trial. Yet, the Supreme Court of Virginia upheld this consolidation on the grounds that there is no "clear and specific legal right" at play that would merit the court's intervention. In doing so, the court basically held that a Virginia trial court can find that one of its rulings will undermine the litigants' rights to a fair trial and still proceed to make the damaging ruling. The Supreme Court of Virginia, in essence, has held that it has no power to and is not required to protect against a bold face denial of due process.

With the West Virginia, and, now the Virginia Petition, two virtually identical examples of standardless aggregations of asbestos cases are now before the Court for review. And there are many more such apocalyptic consolidations pending in state courts around the nation, and undoubtedly more to come if the Court does not act. The Court should take this opportunity to make clear to the states that asbestos litigation is not some legal twilight zone where the Constitution is suspended and due process rights can be trampled upon with impunity by plaintiffs and the courts.

**A. Virginia Code Section 8.01-374.1.**

Virginia Code § 8.01-374.1 provides, in pertinent part, as follows:

> A. In any circuit court in which there are pending more than forty civil actions against manufacturers or suppliers of asbestos or [asbestos-containing products] . . . for personal injury or wrongful death alleged to have been caused by exposure to asbestos or [asbestos-containing products], the court may order a joint hearing or trial by jury of any or all common questions of law or fact which are at issue in those actions. *The court may order any or all of the actions consolidated, unless the court finds consolidation would adversely affect the rights of the parties to a fair trial.* The court may . . . make such orders concerning proceedings therein consistent with the right of each of the parties to a fair trial as may be appropriate to avoid unnecessary cost, duplicative litigation or delay.
>
> B. To further convenience or avoid prejudice in such consolidated hearings, when separate or bifurcated trials will be conducive to judicial economy, the court may order a separate or bifurcated trial of any claim, or any number of claims, cross-claims, counterclaims, third-party claims, or separate issues, always preserving the right of trial by jury . . .
>
> C. Any order entered pursuant to this section shall, for purposes of appeal, be an interlocutory order. Any findings of the court or jury in any bifurcated trial shall not be appealable until a final order adjudicating all issues on a specific claim or consolidated group of claims has been entered.

> D. This section shall not apply . . . to any party defendant unless that defendant was a manufacturer of, or a supplier of, asbestos or [asbestos-containing products], at any of the times alleged in the motion for judgment.

(Emphasis added). (App. K).

Prior to the enactment of Virginia Code § 8.01-374.1, Virginia had no consolidation statute or rule of procedure.[3] The Virginia General Assembly enacted Virginia Code § 8.01-374.1 in 1992 at the request of a plaintiff's attorney in numerous asbestos cases.

The statute mimicked Federal Rule of Civil Procedure 42, with three major differences: it was limited solely to asbestos products liability actions; it applied only to a limited class of defendants (*i.e.*, manufacturers and suppliers of asbestos-containing products); and it cut off all interlocutory review. Virginia is the only state to have enacted a statute specifically governing the consolidation of

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[3] In 1995, three years after the enactment of Va. Code § 8.01-374.1, the Virginia General Assembly enacted a general consolidation statute -- the Virginia Multiple Claimant Litigation Act (Va. Code § 8.01-267.1 *et seq.*). The general consolidation statute provides that "[o]n motion of any party, a circuit court may enter an order joining, coordinating, consolidating or transferring" any civil actions if it finds the following: (1) separate civil actions brought by six or more plaintiffs involving common questions of law or fact arising out of the same transaction or occurrence; (2) that common questions of law or fact predominate and are significant to the action; and (3) that the order will promote the ends of justice and efficiency without violating the parties' right to due process or prejudice their right to a fair and impartial resolution. Va. Code § 8.01-267.1(1)-(3). But unlike Virginia Code § 8.01-374.1, the Multiple Claimant Litigation Act specifically provides that orders of a circuit court consolidating claims for trial are appealable on an interlocutory basis. *See* Va. Code § 8.01-267.8(1). Although the Multiple Claimant Litigation Act is a comprehensive general consolidation statute, the Virginia General Assembly did not repeal or replace Virginia Code § 8.01-374.1 with its passage.

asbestos products liability actions.[4] No published case has interpreted, discussed or relied on Virginia Code § 8.01-374.1. Indeed, the massive consolidation at issue here is the first in Virginia.

**B. Proceedings Below.**

On June 20, 2000, Judge Robert W. Curran of the Circuit Court for the City of Newport News, Virginia ("the Trial Court") ordered that "the most appropriate method of docket management" for the asbestos cases pending on its docket was to use Virginia Code § 8.01-374.1 to consolidate and bifurcate the trials of those cases. (App. G-1). In the same order, the Trial Court made this remarkable finding: ***"consolidation of all cases would adversely affect the rights of the parties to a fair trial."*** The Trial Court further ordered that any consolidation would be done by "categories." Nevertheless, on July 27, 2000, without making any findings as to the commonality of the cases to be consolidated, and in direct contravention of its previous finding, the Trial Court consolidated all of the cases on its docket for a single mass trial:

> At the next docket call, which will be in September, every case that has my name on it is going to be consolidated and I'm going to set the trial for liability . . .
>
> I'm going to consolidate all of my cases and then I'm going up and down the hall and I'm going to tell the other Judges that I'm going to consolidate them on the issue of liability and if they want me to handle some of them, I may very well handle some of them. . . . What I want to do is move as many of these cases along as fast asI can.

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[4] Although West Virginia's consolidation of 8,000 asbestos cases for trial is pursuant to West Virginia's special mass litigation rule, Trial Court Rule 26.01, that rule's application is not limited specifically on its face to asbestos cases.

(App. F-3, 4). The Trial Court then made clear that it would consider removing cases from the consolidated proceedings only on a very limited basis:

> Now, after I consolidate all of these, if someone can establish to me why these cases shouldn't be together -- and the only two reasons I think they shouldn't be together is if they didn't happen in Newport News - maybe that might be a problem - and maybe if the location was different . . . . But someone will have to convince me that I don't have to put them together. But if we're talking about liability, ***I don't think the disease is a significant factor.***

(App. F-5) (emphasis added). At its September 11, 2000 docket call, the Trial Court set the single consolidated trial of nearly 1300 asbestos cases in two phases. The first phase will purportedly determine "liability" issues; the second phase will purportedly determine issues of individual causation and damages. But causation and liability cannot be separated.

Hopeman Brothers and the other defendants in the consolidated trial objected to the consolidation and bifurcation on several grounds, including that (1) it would violate their Due Process rights and right to a fair trial guaranteed by the United States Constitution; (2) it would violate existing settlement agreements between the parties; (3) it would confuse the jury and prejudice defendants; (4) it was in violation of the plain language of Virginia Code § 8.01-374.1; and (5) it violated Virginia's substantive tort law. Even plaintiffs' counsel suggested that the Trial Court consolidate a smaller group of cases ranging from two to ten plaintiffs, and try those cases so that the procedure could be appealed and "the Supreme Court can review what we're doing and tell us, [y]eah, you're on the right track, or [n]o, [h]ere is the way you should be doing it." (App. E-4). The

Trial Court denied defendants' objections to the consolidation without explanation and rejected plaintiffs' proposal for smaller consolidations on the grounds that Virginia Code § 8.01-374.1 "puts [the decision] in the hands of the court." (App. E-2).

In April 2001, the Trial Court ruled that information concerning individual plaintiffs' exposure histories, occupations, and diseases were not relevant to the liability phase of the consolidated trial. For that reason, the court prohibited defendants from conducting substantial discovery from plaintiffs. To this date, because of the strictures imposed by the Trial Court, less than twenty of the nearly 1300 plaintiffs have been deposed.

On June 7, 2001, the Trial Court finally ordered that the following issues be tried in the liability phase of the trial: (1) whether a particular defendant was involved in the design, manufacture, sale, distribution, or installation of asbestos-containing products in the Shipyard during the period in question; (2) whether a particular defendant knew or had reason to know that its product was likely dangerous for the use it was supplied; (3) whether a particular defendant breached any warranties in regard to asbestos-containing products; and (5) whether a particular defendant actively concealed and/or made misrepresentations to the public concerning the dangerous condition of asbestos-containing products and/or their use. The Trial Court has given no other guidance as to how the consolidated trial will proceed on October 22, 2002. Moreover, less than one month before trial, the Trial Court has entered no order and provided no guidance as to how the causation and damages phase of the consolidated trial will proceed. (App. D-1, 2).

On November 14, 2001, plaintiffs submitted a proposed order to the Trial Court listing the specific cases to be tried in the consolidated trial. (App. J). The proposal included all asbestos cases pending before the Trial Court in which

plaintiffs were represented by the Law Offices of Peter T. Nicholl, and in which defendants had been served by January 23, 2001 - approximately 1296 cases.

On November 30, 2001, Hopeman Brothers filed objections to the proposed order and moved the Trial Court to reconsider its consolidation order. Hopeman Brothers argued, among other things, that the proposed consolidation would violate defendants' due process rights. (App. I-2-9). Several other defendants joined in Hopeman Brothers' objection and motion to reconsider.

On December 11, 2001, the Trial Court heard argument on Hopeman Brothers' motion to reconsider. Hopeman Brothers urged the Trial Court to investigate and make findings regarding the commonality of the cases to be consolidated. The Trial Court refused to make such findings: "I don't think -- I just don't think all of this has convinced me that there's any unfairness to this." (App. C-8). The Trial Court set the consolidated trial on the issue of liability to begin on February 27, 2002 and signed plaintiffs' proposed order without substantial modification. Subsequently, the trial date was continued on plaintiffs' motion. At present, 1296 plaintiffs' claims against ten defendants are to be determined in the mass consolidated trial beginning on October 22, 2002.

**C. Decision Below.**

Because Virginia Code § 8.01-374.1 precludes interlocutory appeal of any order made pursuant to its authority, Hopeman Brothers sought a writ of mandamus from the Supreme Court of Virginia to compel the trial judge to protect Hopeman Brothers' constitutional right to due process. (App. H). On June 14, 2002, the Supreme Court of Virginia refused to hear oral argument and denied the request for writ of mandamus on the grounds that "mandamus is not a substitute for appeal." (App. B-1).

Hopeman Brothers petitioned for rehearing, which the Supreme Court of Virginia granted on September 10, 2002, at which time the court vacated its June 14, 2002 order and scheduled oral argument on the Petition for Writ of Mandamus on September 12, 2002.

On September 18, 2002, the Supreme Court of Virginia again denied Hopeman Brothers' request for a writ of mandamus, this time holding that Hopeman Brothers had "failed to establish a clear and specific legal right to be enforced, or a duty which ought to be and can be performed." (App. A-1). Although it did not specifically address petitioner's constitutional arguments in its one-page opinion, the court necessarily held by implication that Hopeman Brothers' due process rights were not "clear and specific legal rights" that ought be enforced by the Court and/or that the mass consolidation ordered by the Trial Court without inquiry as to commonality did not violate those constitutional rights.

Two justices dissented on the grounds that Hopeman Brothers had established "clear and specific" legal rights that can and should be enforced by the court. (App. A-2). The dissent pointed to the rights guaranteed by the Due Process Clause of the United States Constitution as one of these "clear and specific" rights, noting that "[c]onsolidation of cases requires consideration of common questions of law and fact, ability to manage the cases, and issues of convenience and efficiency for the parties and the judicial system." (App. A-4). The dissent relied on the Second Circuit's opinion in *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) for its recitation of the seven factors that a court should consider to consolidate cases in a fair and constitutional manner, and noted that the Trial Court had failed to consider these factors in ordering this consolidation. The dissent concluded:

> Here, the square peg of complex litigation is being forced into the round hole of expediency. The splinters that are flying are the statutory and Constitutional rights of both plaintiffs and defendants to a fair process for the adjudication of their claims. An extraordinary writ is required for these extraordinary circumstances. The writ of mandamus should issue. I dissent from the majority order in this case.

(App. A-6).

## REASONS FOR GRANTING THE WRIT

The Due Process Clause does not permit the consolidation of nearly 1300 asbestos cases against multiple defendants in the absence of any inquiry into or findings regarding the commonality of those claims or the prejudice that would result from such an extraordinary undertaking. The decision of the Supreme Court of Virginia upholding the Trial Court's refusal to make any determination or findings of commonality or prejudice, especially in the face of the Trial Court's finding that the parties' rights to a fair trial would be violated by this consolidation, directly conflicts with cases from other courts recognizing that due process and fundamental fairness require courts to determine whether common questions of law or fact permit consolidation, and whether consolidation will impede the parties' rights to a fair trial. As this Court has made clear, despite the exigencies of the asbestos-litigation crisis, courts are not authorized to abandon the fundamental rights of litigants.

Similar to West Virginia, Virginia has abandoned traditional notions of trial procedure and attempted a "quick-fix" to deal with the asbestos cases pending in its courts. The decision below essentially upholds this consolidation because the Trial Court acted pursuant to a

state statute that permits consolidation of asbestos cases for trial. But a state statute cannot overturn the United States Constitution, nor justify a state court's failure to protect parties' constitutional rights. The Due Process Clause does not permit this unprecedented and profound distortion of the processes of civil justice.

## I. THE VIRGINIA COURT'S UPHOLDING OF A MASS CONSOLIDATED TRIAL IN WHICH NO INQUIRY INTO COMMONALITY OR POTENTIAL PREJUDICE HAS BEEN CONDUCTED CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS.

Hopeman Brothers asserted below that the "clear and specific legal rights" it sought to compel the Supreme Court of Virginia to enforce were those guaranteed to it by the Due Process Clause. Nevertheless, the Supreme Court of Virginia held that Hopeman Brothers was not entitled to a writ of mandamus to prevent this consolidated trial because it had not established "a clear and specific legal right to be enforced, or a duty which ought to be and can be performed." (App. A-1). Thus, the decision below implicitly holds that the rights guaranteed to litigants by the Due Process Clause are not "clear and specific legal rights" that a state court has a duty or obligation to enforce. In the alternative, the only other reasonable interpretation of the decision below is that the Supreme Court of Virginia concluded that the consolidation at issue did not violate those rights. In either scenario, by upholding the mass consolidated trial, the decision below constitutes an explicit approval of the Trial Court's consolidation of these 1296 cases for a single mass trial without any inquiry as to commonality, and in direct contravention of a finding that consolidation would adversely affect the rights of the parties to a fair trial.

1. The Petition Should Be Granted Because the Decision Below Conflicts With the Decisions of Other Courts.

The Virginia court's decision is in clear conflict with decisions of the United States Court of Appeals for the Second and Fifth Circuits, and with state court appellate decisions in California and Texas. As shown in great detail in the West Virginia Petition, those jurisdictions hold unequivocally that due process requires a review of a proposed consolidation or aggregation to ensure commonality and assess the risk of prejudice to the parties. *See, e.g., Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993)(reversing consolidation of 48 asbestos cases because the "benefits of efficiency can never be purchased at the cost of fairness."); *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973)(invalidating consolidation order where it would "deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result"); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997)(invalidating consolidation order on grounds it violated Due Process Clause); *Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954) (precluding consolidation where it deprived litigants of due process rights); *Todd-Stenberg v. Dalkon Shields Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Ca. Ct. App. 1996) (recognizing that consolidation of disparate claims can cause confusion and prejudice to point of depriving defendants of due process); *Union Pac. Res Group, Inc. v. Hankins*, 51 S.W.3d 741, 749 (Tex. Ct. App. 2001)(holding that due process violated in aggregated proceedings unless defendants have "opportunity to adequately and vigorously present any material claims and defenses").

The issue on which the decision below conflicts with these other courts – the constitutional necessity for review of commonality and potential prejudice – has direct and important consequences. In the jurisdictions which follow

these dictates regarding commonality and fairness, there are substantial limits on the number and types of cases that may be consolidated for trial, and meaningful protection of the parties' rights to a fair trial. Those courts generally require the convergence of three factors before consolidation can occur: (1) the cases consolidated must share common questions; (2) the cases consolidated must not be so numerous as to become unmanageable; and finally, (3) the consolidation must result in actual convenience and efficiency for the parties and the Court.

To ensure that constitutional rights are protected, these jurisdictions and others routinely hold that asbestos cases may be consolidated for trial only when, at a minimum, they involve common facts, common worksites, similar occupations, similar duration and time period of exposure, and similar diseases. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (upholding consolidation of 2 asbestos claims for trial because they were sufficiently common); *Malcolm*, 995 F.2d at 354; *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495-96 (11th Cir. 1985) (approving consolidation of 4 asbestos claims after assessing commonality); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 372 (2d Cir. 1993)(non-asbestos case citing criteria for consideration before consolidation). Moreover, the courts "must take into account the number of cases affected" by the consolidation. *Malcolm*, 995 F.2d at 352. Consolidations of as few as 13 asbestos cases have been overturned on the grounds that the parties' rights to a fair trial were impaired by the number of claims tried. *See, e.g., Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) (holding that consolidation of 2 asbestos cases confused jury and prejudiced defendants). In those cases where consolidations have been upheld as constitutional, the number of cases consolidated has been extremely low – exponentially less than 1296. *See, e.g., Johnson*, 899 F.2d at 1281 (consolidation of two cases upheld); *Hendrix*, 776 F.2d 1492 (upholding consolidation of only 11 asbestos cases).

The Trial Court never made a finding of commonality and failed to consider the myriad of differences among the cases before combining virtually every asbestos case on its docket into one huge action. Only by ignoring the Constitution could the Trial Court have lumped these 1296 disparate cases together. In short, the outcome of this consolidation would have been different had the case arisen in any of the majority of jurisdictions that abide by the due process limitations on the aggregation of cases for trial.

2. The Petition Should Be Granted Because the Decision Below Upholds a Clear and Obvious Violation of Constitutional Rights.

While the conflict among the lower courts alone is enough for the Court to grant the petition under § 1257, it is also clear that on the merits, the court below erred in permitting the Trial Court to go forward with this mass consolidation without any inquiry as to commonality and despite the Trial Court's explicit and uncontroverted finding that consolidation would violate the parties' rights to a fair trial.

Although states possess considerable flexibility in creating their own statutes and rules of procedure, they must always respect the Due Process Clause. *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) ("because minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate") (citation omitted). On several occasions, the Court has invalidated state rules of civil procedure when they afford individuals affected by mass litigation inadequate protections. *See Hansberry*, 311 U.S. at 40-42; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Due process limits on state authority to aggregate cases for trial protect important interests of both plaintiffs and defendants. First, due process principles ensure that before they are bound to the outcome of a mass proceeding, plaintiffs receive notice of the action, *see Eisen*, 417 U.S. at 176, and are adequately represented at trial, *see Hansberry*, 311 U.S. at 41-42. Indeed, it was primarily concerns about the adequacy of representation – in light of substantial factual disparities among plaintiffs – that caused the Court to invalidate the proposed class-action settlements of asbestos cases in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

Defendants, likewise, have constitutional rights to due process in proceedings brought against them. Defendants have an obvious interest in ensuring that any judgment in an aggregated proceeding binds all the plaintiffs in the future and, in this sense, the requirements of notice and adequate representation protect defendants by affording them some measure of finality at the close of a mass proceeding. *See Shutts*, 472 U.S. at 809-10 (defendants have standing to allege deficiencies in notice and representation); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Due process constraints on the number and types of cases that can properly be consolidated also safeguard the rights of defendants. The commonality requirement ensures that a defendant forced to deal with several plaintiffs at once is in fact defending only against a single and narrowly presented legal situation. That precaution is especially important in cases like this one, involving not only multiple plaintiffs but also multiple defendants. Without a careful inquiry into commonality, the proceeding may easily become so large and confusing that it is impossible for each defendant to present a meaningful defense: evidence inadmissible as to one defendant may be admitted as to others, *see Cain*, 785 F. Supp. at 1457, and the complexity of

the proceedings may make it impossible for the jury to sort through the mountains of evidence and various defenses to tailor a verdict to each party's culpability, *see Logan*, 455 U.S. at 433 (due process guarantees "the aggrieved party the opportunity to present its case and have its merits fairly judged"); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998) (improper aggregation unfairly allows plaintiffs to litigate on behalf of a composite "perfect plaintiff," combining the strongest aspects of unrelated claims).[5]

Like the similar West Virginia consolidation, this case demonstrates why there are constitutional limits on the number and types of cases that can be aggregated for a single trial. The only thing common about these 1296 cases is that plaintiffs allege exposure to asbestos at the Shipyard at some point in their lives, and are represented by the same counsel. The nearly 1300 plaintiffs have been "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some [plaintiffs] suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis or from mesothelioma." *Amchem*, 521 U.S. at 624 (quotation omitted). It is obviously not the case that all 1296 of the plaintiffs will be "actually before the court" in anything "more than a fictional sense." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990); *see also* Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. Rev. 879, 892 (1995) ("consolidation can leave claimants with as

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[5] Empirical studies establish that juries cannot possibly keep track of the different parties, claims, evidence and legal theories in a consolidated action of this magnitude. *See* Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 Law & Psychol Rev. 43 (1998); Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 Judicature 292 (1989). The effect is a real and quantifiable prejudice to defendants.

little control over their cases as unnamed class members in a class action"). But there has been no inquiry – nor will there be based on the decision below – into whether each of these very differently situated plaintiffs will or can be adequately represented at the mass trial.

On the defense side, the mass trial approved below will make it impossible for defendants to present an adequate defense. Defendants' liability in 1300 cases will be determined without even being able to discover whether plaintiffs actually have an asbestos-related disease.[6] Evidence concerning the alleged knowledge and conduct of all defendants - some that manufactured asbestos-containing products, some that distributed or sold such products, and some that simply installed such products as independent contractors hired by the Shipyard - will be admitted into the mass proceeding. *Gwathmey* 15 F.2d at 154 (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case). And the sheer quantity and complexity of the information that will be presented is virtually certain to overwhelm the

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[6] Based on the limited discovery available, it is clear that many plaintiffs base their claims on nothing more than a "mass screening" diagnosis instituted at the behest of plaintiffs' counsel. The screenings result in a report - that is sent to plaintiffs' counsel, not the individual plaintiff - stating simply that a plaintiff's x-ray reading is "consistent with" an asbestos-related disease. These plaintiffs have never been treated for an asbestos-related disease, and have no symptoms of an asbestos-related disease. Judge Charles Weiner of the United States District Court for the Eastern District of Pennsylvania, who presides over the coordinated pretrial proceedings of the federal Multidistrict asbestos litigation ("MDL"), has ordered a procedure whereby all such cases that are based on such proceedings are subject to administrative dismissal. *See* Order of Judge Charles R. Weiner, dated January 14, 2002, (App. N-2). In doing so, Judge Weiner noted that these types of diagnoses are made without a doctor-patient relationship and result in the depletion of resources for deserving plaintiffs. Plaintiffs can reinstate their cases pursuant to Judge Weiner's Order if they come forward with a credible diagnosis of an asbestos-related disease.

jury, making it impossible to distinguish one defendant or defense from another and to render a fair verdict on each defendant's unique defenses. *Malcolm*, 995 F.2d at 352 (finding that "sheer breadth of the evidence" when 48 asbestos cases are consolidated makes it impossible to prevent jury confusion).

The Court looks to "traditional practice" as a "touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (state civil trials must operate "according to the settled course of judicial proceedings"); *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'").

Traditional practice in both federal and state courts is to review for commonality and prejudice before cases are aggregated for trial. *See, e.g.*, 8 James Wm. Moore, et al., *Moore's Federal Practice* § 42.10[4]-[5] (3d ed. 2002); *Johnson*, 899 F.2d at 1284 (reviewing cases); *In re Ethyl Corp.*, 975 S.W.2d 606, 612-15 (Tex. 1998) (same); *Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516, 518 (N.Y. App. 2000) ("[W]here prejudice to a substantial right is shown. . .a joint trial should not be granted even if common issues of law or fact exist."). And in asbestos cases specifically, traditional practice is to aggregate "five or fewer claims at a time" – and those only on a stringent showing of common or similar worksites, occupations, periods of exposure, and alleged injuries. *In re Ethyl Corp.*, 975 S.W.2d at 612. Federal courts – and the majority of state courts that model their rules after the Federal Rules of Civil Procedure – agonize about the consolidation of twenty-two, *In re Ethyl Corp.*, 975 S.W.2d at 615-17, thirteen, *Cain*, 785 F. Supp. at 1451, four, *Hendrix*, 776 F.2d at 1495-96, and even two, *Johnson*, 899 F.2d at 1285, asbestos claims for trial. A consolidation for trial of the magnitude at issue here "so departs from [the] accepted

norm as to be presumptively violative of due process." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion).

Traditionally, consolidation may not operate to do away with the rights that parties would have if their cases proceeded separately. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (consolidation does not "merge the suits into a single cause, or change the rights of the parties"); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 808 F.2d 133, 135 (D.C. Cir. 1987); *In re TMI Litig.*, 193 F.3d 613, 724-25 (3d Cir. 1999). The Trial Court has found that consolidation would do just that. Nevertheless, it ordered the consolidation anyway and prevented defendants from conducting any meaningful discovery. Moreover, in the face of that finding, the Supreme Court of Virginia approved the consolidation.

Departures from prevailing practice and traditional roles should be particularly suspect in this context. In cases ranging from *Hansberry* to *Amchem* and *Ortiz*, this Court has recognized the critical protections that attend class-action aggregations. Those protections will be rendered meaningless if state procedural innovations, like the Virginia and West Virginia consolidations, operate unchecked by traditional aggregation rules and standards. A mass consolidation that implicates the rights of plaintiffs to adequate representation and the rights of defendants to a fair opportunity to defend should be accompanied by the traditional protections - including the standard judicial inquiry into commonality and risk of prejudice and jury confusion. *See, e.g.*, Joan Steinnman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1042 (1993) (noting concern that mass consolidations lack the " procedural safeguards that due process and codified rules demand in class actions of similar magnitude").

## II. IMMEDIATE REVIEW BY THIS COURT IS BOTH APPROPRIATE AND NECESSARY.

This case, in conjunction with the similar mass consolidated trial of asbestos cases in West Virginia, warrants immediate Supreme Court review. The trial of more than 8,000 cases in West Virginia has already begun. In less than one month, the Virginia Trial Court will begin its first phase of trial to establish each defendant's wholesale liability as to 1296 plaintiffs. In both proceedings, the defendants will be forced to defend themselves without basic information regarding the individual plaintiffs' claims, or even whether the plaintiffs have a legally compensable injury. Moreover, if these issues are not addressed now by the Court, Hopeman Brothers and hundreds of other defendants in West Virginia and Virginia, will be forced to appear in massive trials that could take years to complete, expend untold resources in their defense, and wait years before the violations of their constitutional rights can be addressed. In the end, an appeal several years distant and possible only after great expense, is not an adequate remedy for the immediate violations of fundamental constitutional rights.

The fact that one or a few state courts have adopted or applied a legal standard that conflicts with the law in other courts does not always warrant immediate Supreme Court review. But this case does. The Supreme Court of Virginia's affirmation of a mass asbestos consolidation in which the trial court has made the explicit finding that the parties' rights to a fair trial will be violated by this procedure, and without any review for commonality, constitutes a wholesale disregard for due process. This issue is ripe for review, and has only a limited window of time in which to be addressed by the Court. Hopeman Brothers has exhausted every remedy available to it in the courts below. This Court is the only remaining avenue to ensure the protection of petitioner's fundamental rights.

The Court's jurisdiction under these circumstances is well established. There is no question that the decision below is a "final" decision over which this Court has jurisdiction pursuant to 28 U.S.C. § 1257. A petition for writ of mandamus or prohibition filed before the highest court of a state is a "distinct lawsuit that is 'fully and finally determined' even if 'further proceedings are to be had in the lower court.'" *Board of Educ. v. Super. Ct.*, 448 U.S. 1343, 1345-46 (1980) (quoting *Fisher v. Dist. Ct.*, 424 U.S. 282, 285 n.7 (1976)); *see also Madruga v. Super. Ct.*, 346 U.S. 556, 557 n.1 (1954)("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *Hartman v. Greenhow*, 102 U.S. 672 (1880). A state court's decision to deny a writ of mandamus is "final" for the purposes of § 1257 because it "conclusively determine[d] the right of the applicant to the writ sought." Rober L. Stern, *et al.*, *Supreme Court Practice 159* (8th ed. 2002).

Finally, justice delayed in this instance may be justice denied.. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *see also Local 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). Post-trial review of mass aggregations is effectively unavailable, as the " paucity of appeals challenging trial settings of multiple [consolidated] claims" attests. *In re Ethyl Corp.*, 975 S.W.2d at 610-11. Mass consolidations exert powerful pressure on defendants to settle even meritless cases. Aggregation may raise the stakes of litigation to the point where a defendant simply cannot risk trial, regardless of the merits of their defense, thus opening the door to what are effectively " blackmail" settlements. "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (8th Cir. 1996); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (same); Fed. R. Cir. P. 23(f), advisory committee notes (providing for interlocutory review of class certification decisions because

certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

The settlement pressure exerted by mass aggregation is especially pronounced when, as here, the underlying claims assert potentially serious personal injuries. In *In re Chevron*, which involved an aggregation of 3,000 personal-injury claims against a single defendant, the Fifth Circuit concluded that the decision to aggregate would "probably not [be] effectively reviewable after trial. The pressure on the parties to settle in fear of the result of a perhaps all-or-nothing trial is enormous." 109 F.3d at 1022; *see also, The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong. (July 1, 1999) (Prof. William N. Eskridge, Yale Law School) ("Especially in state courts, defendants in the typical [asbestos] jumbo consolidation now face an Armageddon scenario if they do not settle on terms favorable to plaintiffs."). Indeed, despite knowing little about plaintiffs' alleged claims, many of the defendants in this mass consolidation have already chosen to settle rather than take part in a trial in which the deck is so stacked against them.

Even if forced settlement does not foreclose the opportunity for post-trial appeal, appeal cannot place the last-standing defendants in the same position they would have occupied before a mass consolidated trial in violation of their rights. In fact, appeal ultimately may fail to address the constitution rights that the courts below have flouted because an appellate court will likely resolve any dispositive, non-constitutional assignments of error before addressing constitutional arguments. Thus, it is very likely that Hopeman Brothers and the other defendants could proceed to trial under obviously unconstitutional circumstances and yet be denied appropriate post-trial relief. Furthermore, because the state appellate courts could

order a new trial based upon any non-constitutional findings of error, appeal could subject defendants to more than one trial under the same disabilities the Trial Court has imposed.

As a practical matter, this may well be the only opportunity defendants like Hopeman Brothers will have to bring their claims before the Court. It may also be the Court's best opportunity to clarify the limits imposed by the Due Process Clause on mass consolidations in state courts. Under circumstances like these, immediate review is entirely appropriate. Indeed, it is essential.

## CONCLUSION

For the foregoing reasons, and those set forth in the Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, in *Mobil Corporation and Honeywell International, Inc. v. Bruce W. Adkins, et al.*, No. 02-132, the petition should be granted.

RESPECTFULLY SUBMITTED,

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**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 18th day of September, 2002.

*In Re: Hopeman Brothers, Inc., Petitioner*

**Record No. 020518**

Upon a Petition for a Writ of Mandamus

Upon consideration of the petition for writ of mandamus, papers filed in this proceeding, and argument of counsel, the Court is of opinion that the writ of mandamus shall not issue.

Petitioner is not entitled to the issuance of a writ of mandamus because petitioner failed to establish a clear and specific legal right to be enforced, or a duty which ought to be and can be performed. As this Court has stated:

> "The writ of mandamus, known in England as a high prerogative writ, is justly regarded in this country as one of the highest writs known to our system of jurisprudence; and it only issues when there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. The right which it is sought to protect must therefore be clearly established, and the writ is never granted in doubtful cases."

Hertz v. Times-World Corp., 259 Va. 599, 608, 528 S.E.2d 458, 463 (2000) (quoting Tyler v. Taylor, 70 Va. (29 Gratt.) 765, 766-67 (1878)); accord Town of Front Royal v. Front Royal and Warren County Indus. Park Corp., 248 Va. 581,

584, 449 S.E.2d 794, 796 (1994) (right involved and the duty sought to be enforced must be clear and certain); Richmond-Greyhound Lines v. Davis, 200 Va. 147, 151-52, 104 S.E.2d 813, 816 (1958); Hall v. Stuart, 198 Va. 315, 323-24, 94 S.E.2d 284, 290 (1956); Milliner's Adm'r v. Harrison, 73 Va. (32 Gratt.) 422, 426 (1879).

Accordingly, the petition for writ of mandamus is dismissed.

JUSTICE LEMONS, with whom JUSTICE LACY joins, dissenting.

The majority dismisses this petition for writ of mandamus, not because it approves the actions of the trial judge, but because it finds that "petitioner failed to establish a clear and specific legal right to be enforced, or a duty which ought to be and can be performed." I disagree and therefore, dissent.

This petition involves the consolidation and bifurcation of approximately 1,300 cases against 25 defendants concerning tort claims arising from the "design, manufacture, sale, distribution or installation of asbestos containing products in the Newport News Shipyard." On June 20, 2000, the trial court found "that consolidation of all the cases would adversely affect the rights of the parties to a fair trial." However, the trial court held that "the most appropriate method of docket management in these cases is the use of Code § 8.01-374.1." Accordingly, the trial court directed that "consolidation shall be by categories agreed to by the parties or determined by the Court if the parties cannot agree." Apparently, the parties could not agree upon the categories, and at a hearing on July 27, 2000, the trial court stated: "At the next docket call, which will be in September, every case that has my name on it is going to be consolidated and I'm going to set the trial for the liability."

Thereafter, an order was entered setting the "consolidated liability trial" for "all asbestos personal injury cases pending before this Court in which plaintiff alleges exposure to asbestos-containing products during the course of their employment at Newport News Shipbuilding and Dry Dock Company and where plaintiff is represented by the Law Offices of Peter T. Nicholl" and including "the cases of all plaintiffs filed on or before January 31, 2001, against all defendants served with process on or before January 31, 2001." The case is currently set for trial beginning October 22, 2002.

According to the record before us and the representations made by counsel, neither the plaintiffs nor the defendants wish to proceed in this manner. Efforts by defense counsel to have the trial court make findings of commonality of claims and other matters relating to statutory and due process rights of all parties to a fair trial were rejected by the trial court.

The trial court is proceeding pursuant to Code § 8.01-374.1 which, among other things, and under certain circumstances, permits consolidation of personal injury and wrongful death claims "alleged to have been caused by exposure to asbestos or products for industrial use that contain asbestos." Code § 8.01-374.1(A). The statute is limited to "actions against manufacturers or suppliers." Id. Additionally, the court may order consolidation "unless the court finds consolidation would adversely affect the rights of the parties to a fair trial." Id. Furthermore, subsection "C" provides that "[a]ny order entered pursuant to this section shall for the purposes of appeal, be an interlocutory order. Any findings of the court or jury in any bifurcated trial shall not be appealable until a final order adjudicating all issues on a specific claim or consolidated group of claims has been entered." Code § 8.01-374.1(C).

It should be beyond peradventure that the parties have a right to trial consistent with explicit statutory provisions. In this case no consolidation is permitted if the trial court finds that consolidation would adversely affect the rights of the parties to a fair trial. The trial court has made such a finding; however, it has consolidated all of the cases contrary to the clear mandate of the statute. Counsel for plaintiffs suggested in oral argument that the liability trial would consolidate only 10 cases at a time. Nothing in the record before us supports such a representation. Furtherore, when asked, counsel for plaintiffs could not identify the first ten cases set for trial only five weeks from now.

Additionally, the statute only permits consolidation of cases against "manufacturers and suppliers." Code § 8.01-374.1(A). The trial court's consolidation order refers to defendants who were "involved in the design, manufacture, sale, distribution or installation of asbestos containing products." On the record before us, it would appear that certain cases or claims may be consolidated in violation of the express provisions of Code § 8.01-374.1.

In addition to the statutory rights involved, the defendants maintain that their rights to due process under the United States and Virginia Constitutions are infringed by forcing this enormous consolidation to trial. Consolidation of cases requires consideration of common questions of law and fact, ability to manage the number of cases, and issues of convenience and efficiency for the parties and the judicial system.

The United States Court of Appeals for the Second Circuit illustrated the due process concerns in Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993). In an appeal of one of 48 consolidated cases against 25 defendants involving asbestos exposure, the Court reversed and remanded the case for a new trial stating, "[t]he benefits of efficiency can never be purchased at the cost of fairness."

Id. at 350. Noting that consolidation must be justified by common issues of law and fact, the Court listed numerous issues that trial courts should consider before consolidation, such as:

1. the sheer number of plaintiffs;
2. the disease type of a particular plaintiff;
3. the existence of exposure at different worksites;
4. the occupations of the plaintiffs;
5. the duration of exposure;
6. the existence of third party claims;
7. whether the plaintiffs were living or deceased;
8. the status of pretrial discovery.

Id. at 350-51.

The Court noted that what precautions were made by the trial judge were "feckless in preventing jury confusion." Id. at 352. Citing the "dizzying amount of evidence" and the "cosmic sweep of the factual data that the jury had to absorb," the Court concluded that fundamental concepts of fairness required a new trial. Id. at 349. See In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990); Cain v. Armstrong World Indus., 785 F.Supp. 1448 (S.D. Ala. 1992). Further, Petitioners in the case before us assert that issues such as "duty to warn" and "forseeability" may depend upon the occupation or the particular employer of the plaintiff. It is represented to the Court that discovery depositions of plaintiffs have been permitted in approximately two dozen of the 1,300 cases.

In my judgment, we need go no farther than the clear statutory violations to find a "clear and specific legal right to be enforced." Stated simply, both plaintiffs and defendants have a right to a trial in accordance with the statutory requirements. It is nothing short of astonishing that the trial court would make a finding that consolidation of all of the cases would "adversely affect the rights of the parties to a

fair trial," and consolidate all of them nonetheless. The writ of mandamus should issue to compel the trial court to comply with the statute. It is "a duty which ought to be and can be performed."

While the majority does not address the issue of adequate remedy at law (See Goldman v. Landsidle, 262 Va. 364, 371, 552 S.E.2d 67, 71 (2001)), it must be recognized that Defendants may proceed to trial and then avail themselves of the right to appeal an adverse judgment at the conclusion of the consolidated and bifurcated cases. Given that the plaintiffs object, such a remedy would be available for each of them as well. But, the remedy "must be equally as convenient, beneficial and effective as the proceeding by mandamus," Carolina C & O Ry. v. Bd. of Supervisors of Scott County, 109 Va. 34, 37, 63 S.E. 412, 413 (1909), and even if there may be another legal remedy, "if such remedy be obsolete or inoperative, the mandamus will be granted." Richmond-Greyhound Lines, Inc. v. Davis, 200 Va. 147, 152, 104 S.E.2d 813, 817 (1958) (quoting Page v. Clopton, 71 Va. (30 Gratt.) 145, 146 (1878)).

Legal literature and appellate opinions are replete with examples of trial processes in asbestos litigation that take so long that some plaintiffs die before they might have benefited from an award. Defendants "die" as well, as evidenced by bankruptcies involving corporations sued in asbestos litigation nationwide. Where both plaintiffs and defendants oppose the consolidation, shall we wait for years for this litigation to result in an appeal that will most likely result in reversal and retrial? Here, the square peg of complex litigation is being forced into the round hole of expediency. The splinters that are flying are the statutory and Constitutional rights of both plaintiffs and defendants to a fair process for the adjudication of their claims. An extraordinary writ is required for these extraordinary circumstances. The writ of mandamus should issue. I dissent from the majority order in this case.

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 14th day of June, 2002.

*In Re: Hopeman Brothers, Inc., Petitioner*

**Record No. 020518**

Upon a Petition for a Writ of Mandamus

On consideration of this case, the Court is of opinion that the writ of mandamus shall not issue as prayed for because mandamus is not a substitute for appeal. Morissette v. McGuinniss, 246 Va. 378, 382, 436 S.E.2d 737, 740 (1985). It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioner his costs expended about his defense herein.

A Copy,

Teste:

David B. Beach, Clerk

By: \s_____

Deputy Clerk

Respondent's costs:

Attorney's fee $50.0

Teste:

David B. Beach, Clerk

By: \s_____

Deputy Clerk

**VIRGINIA:**
**IN THE CIRCUIT COURT OF THE**
**CITY OF NEWPORT NEWS**

**IN RE: ALL ASBESTOS CASES**
**AT LAW NUBMER 700CL99-20000-00**

**TRANSCRIPT OF PROCEEDINGS**
**Newport News, Virginia**
**December 11, 2001**

**Before:**

**THE HONORABLE R. W. CURRAN, Judge**

TAYLOE ASSOCIATES, INC.

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Norfolk, Virginia

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PROCEEDINGS

THE COURT: Mr. Bilms, let's start with this.

MR. BILMS: Good afternoon. I guess the good news is looking over the sea of faces, not everybody sitting out there has anything they'll be arguing in front of the Court today. It may not be quite as bleak as it looks at this point.

The first thing on the agenda today is our presentation of the consolidation order, that is, the order which contains the names of all the cases that are going to be included in

the consolidated trial. I would just note the original order I filed had 1,298 names.

We found there was one person included in the list who did not belong on the list. Just so all of the parties are aware, his name is Aaron Duck, number 340 on the list. I prepared an order in which Mr. Duck is not included on the list, and we did this instead of circulating an order for everybody to sign. We did by order of or notice of presentation, and I invited people to make objections is they objected to the order, and we have several objections, one of which is to the consolidation itself. So, before I present this to the Court - -

THE COURT: Let me have it up here.

MR. BILMS: And Mr. Voyer pointed out to me that when I drafted the order, it says at the bottom of the first page, "No objections have been noted." So, that will have to be changed to, "Objections having been noted," and assuming you overrule those objections that the order will be entered at such.

MR. VOYER: Your Honor, objections have been noted from the beginning, and, obviously, this language has to be changed. On behalf of Hopeman Brothers, Inc., we have filed an objection and motion to reconsider the consolidation, and on behalf of Hopeman Brothers, Lori Elliott is here to argue that motion.

THE COURT: Go Right ahead.

MS. ELLIOTT: Good afternoon, Your Honor. As Mr. Voyer said, we're here on behalf of Hopeman Brothers. We thought this was a good opportunity given the time that has elapsed and the events over the past year to revisit where we stand with regard to the consolidation order that was entered first in June of 2000 and then the bifurcation order that was entered in June of 2001.

As this Court is aware, the landscape of asbestos litigation has changed significantly since Mr. Hatten and Mr. Glasser first went to see Seanator Scott about changing the law in Virginia in order to get a consolidation statute which would allow consolidation in asbestos cases.

Appropriately, they were looking to Federal Rule 42 for guidance on how to get that statute enacted and how to draft it. Events over the past year perhaps have been even more significant to where we are today than what had happened over the past decade in that many of the primary manufacturers, the primary money people, that were involved in settlements have gone bankrupt, and the defendants that are here before Your Honor today and in many other cases around the country are taking a look at the model used previously to analyze where they're going to go from here.

Appropriately, the Court is looking to eliminate or resolve as many cases as possible on its docket and to get relief to all the parties involved, not only to the plaintiff but also the defendant and this Court, so that its resources can be used more effectively for other things.

We will submit that there are other ways to accomplish that than consolidation that we have arrived at now. Now, granted, the statute does allow for consolidation in asbestos cases and allows for consolidation for product manufacturers and suppliers, and most importantly it does not allow for consolidation in instances where a fair trial would not be available and where prejudice would result to the defendants.

As this Court knows and has considered, there is due process ramifications and fair trial ramifications to what we're looking at for the future. We have, as Mr. Bilms pointed out, 1,297 plaintiffs in this proposed consolidation. There has never been a consolidation that has worked

efficiently that has been approved for that many plaintiffs, and the issues before the Court are more complex than initially regarded simply by whether a particular defendant knew or should have known particular things or should have had warnings.

We would submit that the Court needs to make some findings to satisfy the due process requirement by the Virginia Constitution, the U.S. Constitution, that require commonality of the claims, that require the number of cases to be manageable and to address the efficiency and convenience of the issues before the Court.

The way this consolidation is set, we still have over 25 defendants and 1,297 claimants who in some way are supposed to be ready for trial in February. We would submit that there has been no evidence provided by the plaintiff to satisfy the requirements of due process in a fair trial in this case. This is essentially equivalent to a class action, and the courts have resolved that these cases are not amenable to class action-type treatment.

One of the things I noted in reviewing for this haring today was the transcript from July of 2000 when this Court noted that one of the important considerations was the work site; where did these claims arise from and where did they come from, and while most plaintiffs spent some time at Newport News shipyard, they did not all spend time there, and more importantly most did not spend the most significant part of their time there. Consequently, a common work site is not presented in these claims.

We have plaintiffs who worked for less than a year at Newport News. We have plaintiffs who worked more than 50 years there, and, frankly, the diversions of those types of exposures is going to be crucial in the assessment of these liability issues.

Some of these claimants, in fact, worked at manufacturing operations where they were actually manufacturing asbestos products. Depending on how much of their time was spent in those types of operations is going to be significant, whether we're looking at whether or not their disease, if they have one, and that's going to be an important issue, resulted from any of the defendants in this room.

As Selikoff recognized, asbestos products present different risks, and the way you determine the risk is based on the type of product, the physical characteristics of the product, the composition of the product and the circumstances under whish the plaintiff was exposed to it.

In the cases at hand, we have people who worked

* * *

each of these defendants is entitled to and at the same time impacts the rights of the plaintiffs and weights the resources of this Court.

We would ask that Your Honor deny Mr. Bilms' motion, or order to consolidate, and revisit this issue of how we are going to address the cases currently pending on this Court's docket, and in the alternative we ask the Court to stay the February trial date so that we may seek relief elsewhere if we are unable to reach some resolution here today.

I'd be happy to answer any questions Your Honor might have. Otherwise, I'll by happy to let Mr. Bilms - -

THE COURT: Mr. Bilms' reponse?

MR. BILMS: Thank you, Your Honor. By my count, Your Honor, this is now the fourth time we've argued this issue or these issues. We've argued the consolidation issue, we've argued the issue of what questions the jury should

answer in the first phase of consolidation, what questions they should answer in the second phase of consolidation.

We've argued the issue of the mix of diseases our clients present. We've argued the issues of the mix of jobs they've held at the shipyard and different work locations at the shipyard. In my view, Your Honor, this motion, well written brief, well argument or well reasoned argument, is

* * *

What takes so long is to try to establish state of the art and all of the other elements that are involved in an asbestos case, but when it gets right down to the individual, about his exposure, his medicals, et cetera, that has taken - - the longest it's ever taken has been two days out of an 18-day trial. So, I just don't understand where all this business about how unfair it is. I mean it's sort of a - - shows a lack of confidence in Counsel's ability to convince a jury of their cause.

You know, it seems like all juries are automatically going to rule against them as soon as they come in. I don't think that's necessarily true. I've actually tried three lengthy asbestos cases. Two of the three cases had defendants' verdicts. I wonder why the defendants are so afraid of these trials. They prevailed in two of the three I tried.

I don't think - - I just don't think all of this has convinced me there's any unfairness to this, and I think a lot of the argument today has to do with the second phase. So, this Court is overruling any motion to not enter this order. It needs to be tidied up.

MR. BILMS: Yes, sir.

THE COURT: I'm going to enter the order as tidied up. Okay. Next?

MS. ELLIOTT: Thank you, Your Honor.

**VIRGINIA; IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**MEMORANDUM: Asbestos Cases Bifurcation-RC**
To: File
From: Judge Curran
Subject: Issues Order
Date: June 7, 2001

The Court has reviewed the proposed orders presented by the parties concerning issues in the liability phases of these cases. The proposals are unusual in that the parties are attempting to submit jury instructions prior to any evidence having been heard in this matter. Some of the proposed issues have previously been decided as a matter of law in this Circuit and in the Federal Courts. Others are more appropriate for closing arguments.

The issues in the liability phase of this case should be the issues set out in the Virginia Cases of Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128 (1992) and Featherall v. Firestone, 219 Va. 949 (1979).

Based upon these cases and the submissions of Counsel the Court has adopted the following list of issues:

1. Whether a particular Defendant was involved in the design, manufacture, sale, distribution or installation of asbestos containing products in the Newport News Shipyard during the period in question.
2. Whether a particular Defendant knew or had reason to know that the asbestos-containing product was likely to be dangerous for the use for which it was supplied.

3. Whether a particular Defendant failed to provide adequate warnings of the dangers associated with the ordinary and foreseeable use of the asbestos containing products.
4. Whether a particular Defendant breached any warranties with regard to any asbestos containing products.
5. Whether a particular Defendant actively concealed and/or made misrepresentations to the public concerning the dangerous condition of asbestos containing products and/or their use.

\s\ RWC
RWC

VIRGINIA:

IN CIRCUIT COURT OF
CITY OF NEWPORT NEWS

RE: ALL ASBESTOS CASES ) RECORD CL99-20000

Before Hon. Robert W. Curran, Judge
Newport News, Virginia
December 14, 2000

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APPEARANCES:

Law Offices of Peter T. Nicholl (Mr. Kevin P. Bilms and Mr. Michael T. Edmonds), attorneys for the plaintiffs.

Church and Houff (Mr. Thomas Radcliffe, Jr.), attorneys for defendant Georgia Pacific.

Vandeventer Black (Mr. Robert L. O'Donnell), attorneys for defendant CCS.

Willcox and Savage (Ms. Joyce Jackson Wood), attorneys for defendant Rapid-American.

Payne, Gates, Farthing, and Radd (Mr. Marshall A. Winslow, Jr.), attorneys for defendant Porter Hayden.

* * *

THE COURT: Some time after the last hearing, I began to be bombarded with letters from various defendants in these cases; and I began to just almost put them in the trash because of the fact that it was clear to the court that the people who were writing these letters didn't listen or didn't want to hear what the court has said on previous occasions. Worse than that some of the letters addressed issues that were put to rest prior to the Watson case, and some were put to rest by the Watson case, and I decided at that point that I was not going to be bothered reading these letters because everybody was trying to revisit what we decided - - the court had decided a long time ago, and that was that we were going to do these cases liability first and then damages.

Now, I don't understand why everybody has so much trouble understanding this; and it may very well be because there are too many people involved outside of the state of Virginia who don't quite understand Virginia law; but as far as the court's concerned - - and I don't understand why there's so much confusion. Firs of all somebody needs to go back and tell everybody that 8.01-374.1 puts this in the hands of the court. Now, I think perhaps if we could do this - - and maybe I could finally get it across if I would do it this way. I guess the best way to explain what the court had in mind was to do it backwards.

If you look at Virginia Model Jury Instruction 2.210, that instruction deals with a situation in which liability has been determined by the court prior to the time we submit issues to the jury; and that instruction says, Therefore, the only issues you have to decide are whether the plaintiff was injured as a result of the accident and if so, the amount o f the damages the plaintiff is entitled to recover if any.

Now, if that's the only issue left in a case where liability has been determined by the court, then we look to see

what's left; and that's what we discuss when we're talking about he liability phase of these trials; so in the second phase of the trial, you would decide whether the plaintiff was entitled to recover, if any; so what you have left - - what has to be determined is that you have to determine in the first instance - - and I'm not saying exactly what's here - - but you

* * *

issues or some claims is not appealable until there has been a determination of those claims with regard to the particular plaintiff's case; so the concern there is that by having two, three, ten, whatever number of plaintiffs whose cases are decided, once that is done - - because, you know, you've gotten all those letters. I got them too. The defendants are raising objections to procedure - - once that's done and there's a final judgment, whether in favor of the defendant or in favor of the plaintiff, and awards the plaintiff money damages, that can then be appealed to the Supreme Court.

Before we go any further with any of these other cases, we know whether or not we're doing the right thing. Frankly, I think we are. I don't think there really is a well-founded objection to this procedure; but as the court stated in the last hearing, that the goal - - which I wholeheartedly agree with - - in this procedure is to dispose of as many cases as possible, as quickly, fairly and economically as possible. Well, then I think we ought to consider putting some cases in there so that he Supreme Court can review what we're doing and tell us, Yeah you're on the fright track or, No. Here is the way you should be doing it; and then finally also in line with the goal of trying to dispose of these cases as quickly and effectively as possible, if we include illustrative plaintiffs' cases in there, and we get a verdict in favor of those plaintiffs, then it will give the parties guides on what the value of these cases is because that's a big issue in the ongoing negotiations that we have with all these defendants. It gives us some idea of what these cases are worth, that they're not million dollar cases. They're no $500 cases either. This is what a jury id likely to award, and that as you well know plays a large role in determining what it is that a case is worth and whether or not it will settle; so I think those are reasons why we have to make a determination as to whether or not it will settle; so I think those are reasons why we have to make a determination as

to whether there will be product identification testimony involved in the general liability phase of the trial, because as you pointed out, how do you work that? I don't know if you can unless you have representative plaintiffs in there that give us the opportunity to say, Here's what these products were, here's how they were used, and here's what happened; and that is the one question I have.

THE COURT: So what you're saying is that you have in the first phase, which we call the liability phase, that you would have in addition to all the information that I talked about as history et cetera - -

MR. BILMS: Yes, sir.

THE COURT: And also history information that would establish that a particular product was in the shipyard in the year 1940 to 1970. You want to have examples of particular plaintiffs - -

MR. BILMS: That's correct.

THE COURT: - - who would then talk about the specifics of their exposure?

MR. BILMS: The specifics of their exposure, the specifics of their injuries and their damages. Those individual plaintiffs - - whatever number the court decides is a manageable number - - to work along with these other issues that will be tried in sort of an overarching basis will then be finally resolved. Their cases will be completely resolved and adjudicated, and they'll be presented or capable of presentation to the Supreme Court if anybody feels the need to do that. Meanwhile, the general issues that we will have tried regarding the knowledge of the various defendants, when they made their products, when they knew that they were dangerous or had reason to know that

they were dangerous, what warranties they made, those will still be there and may then be applied to the subsequent cases at which each individual plaintiff will then say, I was exposed to Owens-Corning. I was exposed to - -

THE COURT: Well, the reason why you might be able to do that in this case but you couldn't do it anywhere else is because as opposed to the ordinary Virginia procedure, this statute says that court may submit special interrogatories to the jury to resolve certain issues of fact.

MR. BILMS: Yes, Your Honor.

THE COURT: With usual general law you just have a general verdict.

MR. BILMS: That's correct, and I think that the legislature did that specifically with this sort of procedure in mind, and then by using the - -

THE COURT: You really think that they thought - -

MR. BILMS: That they though that much about it?

THE COURT: I think this was submitted to them by some plaintiffs' representatives and they - -

MR. BILMS: I know we think about things like that.

* * *

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**IN RE: NEWPORT NEWS CIRCUIT COURT ASBESTOS CASES**

**CL90-10000C-03**
**CL90-10000W-01**

**BEFORE: The Honorable Robert C. Curran**
**DATE: July 27, 2000**

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* * *

worked out extensions but, you know, we would like to have some understanding of when we'll be able to get this.

MR. HEARNS: Your Honor, we would request 21 days.

THE COURT: All right. I realize the problem we have.

MR. PATTEN: All right, sir.

THE COURT: Faster if possible.

MR. HEARNS: Yes, sir.

THE COURT: Okay.

MR. PATTEN: That's it for Felxitallic.

THE COURT: Now, let me address this. I have no idea why everybody is here. There's only one person I would like to acknowledge. Is Mr. Voyer here?

MR. VOYER: Yes, sir.

THE COURT: Would you please stand up. I want everybody to see this gentleman. This gentleman has the ability to understand the English language. In he letter that he wrote - - thank you. You may be seated. I wanted everybody to get a look at you so they could probably ask you later on, you know, how they could get some help in this area.

This is what he says in his letter. It says here, I believe the Court simply wants to know whether we have reached an agreement or not. If then, then the Court will establish the category.

So, now, I get all these letters here - - first of all, I think all of you who wrote to each other better be aware of the following rule of court that came down and its called Motions Practice. And what Motions Practice says, it says, "All motions shall be scheduled and heard by the Court using the following procedures: A Court may authorize counsel of record to schedule hearings on written or oral motions by the following methods: Presenting the motion on a day the Court designates for motions hearings." Later on it says you don't have to get permission from the other person who set it, you just have to give them reasonable notice. It says, "Counsel of record shall make reasonable effort to confer before giving notice of a motion." I just want to warn everybody that you no longer can write somebody a letter and say, Look, I've got this thing and it says I have to be there in seven days. You didn't file a formal motion. I'm not sure that anybody has to do that under that rue. It may be that the Court is not going to accept it, but this rule may very well have done away with all the courtesies that this circuit used to require with regard to somebody having to get a date cleared, so just look out for that rule.

Now the second thing is, the Court advised everybody that we're going to be proceeding under 8.01-374.1, which is the bifurcation statute. Now, as opposed to the new pretrial scheduling order rule under which I believe counsel are fully in charge, this statute - - and I sort of did this, and if you'll notice, what you can see is very large words. It says "the Court" may order a joint trail and "the Court" may order all the actions consolidated if "the Court" finds - - so I am not going to listen to all of these proposals. The deal was you agree or I set it, so this is it.

At the next docket call, which will be in September, every case that has my name on it is going to be consolidated and I'm going to set the trial for the liability. The reason why I'm doing it is this: It's my responsibility to try to move these cases along. Now, if we all try these cases

for liability and the defense prevails, then I've removed all the cases from the docket. If the plaintiff prevails, then I'm faced with a situation where all I have is a series of cases where I just have to try the damages. And those of us who have been through the Watson case know the case took 18 days to try. The medical testimony was really a short part of that case. The next case that we tried in which there was medical testimony, that took only a couple of days. So I believe that if we try the liability, subsequent trials for damages in these case would almost be like routine cases that we try day to day.

So what's going to happen, you better - - and don't if you'll remember the last time this came up, someone said we need so many years to get ready. Wrong. You're ready to try cases now. For example, except for the fact that I think it might not be fair to the particular parties involved, sometime in September, some of the parties here are ready to try a case on liability. You're going to have to do that to present it and the defense is going to have to defend on liability.

So the Court's position is that the next docket call- - now, not only - - just so you'll understand how this is going to happen, I'm going to consolidate all my cases and then I'm going up and down the hall and I'm going to tell the other Judges that I've got all these cases that I'm going to consolidate on the issue of liability and if they want one to handle some of them, I may very well handle some of them, because the only way this Court can read all the literature - - in fact, in this morning's paper there's an article on Courts not moving criminal cases along and the Supreme Court has certain guidelines for us to move cases along and they want us to be responsible, and 8.01-374.1 says that we are. So I'm not going to listen to all of these proposals. Some of them are very nice. Somebody wanted me to do seven cases and then seven more. I mean, that wouldn't do anything for me. What I want to do is to move as many of these cases along as fast as I can.

Now, after I consolidate all of these, if someone can establish to me why these cases shouldn't be together -- and the only two reasons I think they shouldn't be together is if they didn't happen in Newport News - - maybe that might be a problem - and maybe if the location was different. I can understand that there may very well be a reason why you wouldn't try Horner (phonetic) Brothers and the shipyard together. I'm not sure. But someone will have to convince me that I don't have to put them together. But if we're talking about a liability, I don't think the disease is a significant factor. That will come up when we get to the issue of the damages.

So that's .the way this Court is going to move - - along and everybody can came to the September docket call prepared to set the cases. If you want to agree to get together and get some dates from my office and try to agree on a trial date before the September docket call, that would be fine. I don't have any problem with that, but we are not going to do this in little pieces. There was an issue raised about whether - - I mean, I can't make - -we can't try a case that hasn't been filed by the time we get to it. I don't think that would have anything to do with it. But those cases that are here can certainly be consolidated up to the time of trial.

So I think the only way that we're going to move these cases is to have the issue of liability resolved and thereafter split them up on the individual cases as far as damage is concerned.

Does anybody have any problem understanding that?

MR. HATTEN: I think everybody understood what you said. I would like - - I would be happy to defer this until the time of the docket call - to just generally give you one issue that I think is the only issue that may differ between all of us and the Court, and that is that the Patten, Wornom, Hatten & Diamondstein firm is settled at this point in time with all

the defendants except three - flexitallic, GAF, and Owens Illinois. Now, to be candid with the Court, we are in settlement negotiations with all three and I'm hopeful perhaps by September that they will all be gone. The people with whom we are settled have contracts with us that we will not litigate cases against them because we're recommending settlements to them, and as the Court is aware, that's worked very well to resolve a lot of cases. It would present a difficulty if our office is required to participate in a trial against parties with whom we have settled, and so to that extent- -

THE COURT: Well, as to those cases that are in the consolidation, you can nonsuit those parties or have some agreement to nonsuit those parties on the particular cases that are here, the ones that I consolidated. It wouldn't make any sense for me to force you to prove a case against somebody that you don't have a disagreement. .

MR. HATTEN: That's not going to be an issue. The issue would come up to the extent that they are overlapping issues of liability. As you recall the state of the art, for instance.

THE COURT: Yes.

MR. HATTEN: And if I'm going after GAF and OI and Flex, to the extent that I'm going after them on the issue of state of the art, I'm in effect - - that's going to spill over to everybody else, and so that's their, objection, and to that extent that's an issue.

Now, we have 30 days in which perhaps we can meet with counsel, try to work out some procedure that will work that out.

THE COURT: You can try to work something out, but I've got to clean up this docket somehow.

MR. HATTEN: I understand. What we had thought about beforehand, and it may not be acceptable to the Court, but what we had thought about beforehand was because we will have such a defined number of defendants, perhaps two by the time we get to September, at the most, and probably just one, the consolidation there of our cases against just that one company would probably go very quickly and for a much more discreet number of clients;. whereas, the cases for Mr. Bilms, who does not have these agreements, is against all these ladies and gentlemen in the courtroom. And our cases, with the benefit of only one or two lawyers in the courtroom, I know would go much faster. If Mr. Bilms is in the courtroom by necessity, whether they're in or out, is going to have ten or twelve different lawyers in that trial and that trial is liable to be a much, much. longer trial. And so I would ask the court, as we - - not to make a decision today but these are issues that- -

THE COURT: You might be able to use the education. Maybe you'd like to be down there and learn something.

MR. HATTEN: I'm sure that it would be interesting. But those are issues that do concern us and we would like to try to preserve the judicial efficiencies that we've created with the settlement agreements without putting them at jeopardy, and I'm hopeful that it will all go away by the time this docket call comes. And live heard you and we'll talk again to defense counsel and it may be that there would be some procedures that we could create that could avoid the problem, but the defense attorneys who have these agreements have suggested to me that I would be in breach of those agreements if I'm in the same courtroom in a trial against them even though my clients are not directly suing them, so that's a concern and I just bring it up. I don't ask that the Court resolve it today.

I would like to bring the Court up to date on the status of the GAF response to discovery. That is why we're here. And I'm pleased to advise that GAF has made an effort to comply with our responses to discovery. I've gotten seven boxes of dents. I've gotten through six and-a-half of those boxes. I've gotten supplemental responses to interrogatories this morning. I've gotten responses to request for admissions this morning. There is another set of responses to admissions that I have granted them an extension on because it was a lengthy request relating to about 700 documents, and so we are making progress. And to the extent that the court marks down a date to get back with Flexitallic and Mr. Patten, I would ask that we continue the matter with GAF because-we are trying to work that out but there is - - there are two issues that I would like to bring to the Courts attention specifically. The first is that they have identified - -

THE COURT: Mr. Hatten had scheduled his

* * *

CERTIFICATE

COMMONWEALTH OF VIRGINIA

CITY OF NORFOLK, to wit:

I, Debora L. Ragland, do certify that the foregoing pages are a true and accurate transcript of the proceedings had at the time and place mentioned.

This 10th day of August 2000.

My commission expires July 31, 2001

LEWIS & DeBERRY

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**MEMORANDUM: Asbestos Cases**
To: All Counsel
From: Judge Curran[1]
Subject: Trial of Cases
Date: June 20, 2000

1. The Judges have reviewed the information provided by Counsel in these cases.
2. The Judges of this Circuit have determined that the most appropriate method of docket management in these cases is the use of § 8.01-374.1 of the Code of Virginia.
3. The Court finds that consolidation of all the cases would adversely affect the rights of the parties to a fair trial. The consolidation shall be by categories agreed to by the parties or determined by the Court if the parties cannot agree.
4. The Court finds that bifurcated trials the issue of liability will be tried first.
5. Counsel shall make arrangements with the individual Judge assigned the cases for implementation of these policies.
6. Counsel is directed to changes in Rule 1:18 of the Virginia Supreme Court Rules effective July 1, 2000. That would not change agreed Pretrial Scheduling Orders but would require a different procedure if the parties cannot change.

\s\ RWC

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[1] Judge Curran sent this memorandum as Chief judge. Effective July 1, 2000, the Honorable Edward L. Hubbard becomes Chief judge.

**IN THE SUPREME COURT OF VIRGINIA**

| | |
|---|---|
| **In re:** | § |
| **HOPEMAN BROTHERS, INC.,** | § **Record No. ____** |
| ***Petitioner.*** | § |

**PETITION FOR WRIT OF MANDAMUS**

On Petition from Orders of the Circuit Court of
Newport News, Virginia
Entered in the actions captioned In re: All Asbestos Cases
At Law No. 700CL99-200000-00
The Hon. Robert W. Curran, Judge

---

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## PETITION FOR WRIT OF MANDAMUS

COMES NOW Petitioner Hopeman Brothers, Inc. ("Petitioner"), and petitions this Court to issue a writ of mandamus to compel the Honorable Judge Robert W. Curran of the Circuit Court for the City of Newport News ("the Trial Court") to vacate its Orders consolidating 1296 asbestos cases for trial beginning on October 22, 2002, and to abide by the requirements of Code § 8.01-374.1, and the Virginia and United States Constitutions. In support thereof, Petitioner states as follows:

## I. PRELIMINARY STATEMENT

The Trial Court consolidated nearly 1300 asbestos personal injury and wrongful death cases for a single mass trial to begin on October 22, 2002.[1] This unprecedented consolidation was purportedly pursuant to powers conferred on the Trial Court by Code § 8.01-374.1. Yet the Trial Court's actions are in violation of the clear and explicit mandate of Code § 8.01-374.1. That statute permits circuit courts to consolidate cases against manufacturers or suppliers of asbestos and asbestos-containing products only where consolidation does not adversely affect the rights of the parties to a fair trial. In its Memorandum Order of June 20, 2000, the Trial Court specifically stated that consolidation of all asbestos cases pending before the Court ***"would adversely affect the rights of the parties to a fair trial."*** In addition, Code § 8.01-374.1 only permits consolidation of cases involving manufacturers or suppliers of asbestos or asbestos-containing products. Yet the consolidation ordered by the Trial Court includes cases other than those limited to manufacturers and suppliers. The Trial Court has acted in direct contravention of Virginia

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[1] The trial date was continued from February 27, 2002 on Plaintiffs' motion.

law. If the Trial Court's orders are permitted to stand, they will result in gross violations of Petitioner's rights, and the rights of all the other defendants in this multitude of cases, under both the Virginia Constitution and United States Constitution.

Though mandamus is an extraordinary remedy, its very purpose is to correct the sort of abuse represented by the Trial Court's consolidation orders. As this Court recently stated, a writ of mandamus will issue "when the right involved and the duty sought to be enforced are clear and certain, and when there is no other specific, adequate remedy that is available." Goldman v. Landsidle, 262 Va. 364, 371, 552 S.E.2d 67, 70 (2001). This is exactly the situation presented here. Petitioner, like all defendants, has undisputed rights to a fair trial and due process under both the Virginia Constitution and the United States Constitution. Both this Court and the Circuit Court of Newport News have a duty, as a general matter and under the specific language of Code § 8.01-374.1, to protect those statutory and constitutional rights. The Trial Court must be compelled to carry out its duty to abide by Virginia's statutes and constitutional principles.

Petitioner has exhausted all alternatives to a writ of mandamus through its repeated objections to this consolidation and through its motion to reconsider. If this Court does not issue a writ of mandamus, no adequate remedy exists to protect Petitioner from the imminent violation of its constitutional and statutory rights that will certainly result should this matter proceed to trial as currently consolidated.

In a sister code provision, Code § 8.01-267.1 et seq., the General Assembly provided for immediate appellate review of consolidation orders. But the special statute regarding consolidation of asbestos cases, Code § 8.01-374.1, specifically denies this appellate review. The General

Assembly has thus singled out asbestos cases as a subset of all cases in Virginia and tried to take away appellate review. This is an unprincipled tampering with the judicial power of Virginia's courts. Should this Court decline to issue a writ, Petitioner will be forced to appear in a massive trial that could take years to complete, expend untold resources in its defense, and wait years before the violation of its constitutional rights can even be addressed. Only then would Petitioner have an opportunity to re-try the cases in a process that adequately protects its rights. Such an outcome would be detrimental not only to Petitioner, but to all other parties to this action, as well as to the already over-burdened court system.

For these reasons and those set forth below, Petitioner prays that this Court will issue a writ of mandamus to uphold Petitioner's constitutional and statutory rights.

## II. BACKGROUND AND PROCEDURAL HISTORY

### A. Legislative History of Code § 8.01-374.1

Code § 8.01-374.1 provides, in pertinent part, as follows:[2]

> A. In any circuit court in which there are pending more than forty civil actions against manufacturers or suppliers of asbestos or [asbestos-containing products] . . . for personal injury or wrongful death alleged to have been caused by exposure to asbestos or [asbestos-containing products], the court may order a joint hearing or trial by jury of any or all common questions of law or fact which are at issue in those actions. The court may order any or all of the actions consolidated, unless the court finds

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[2] A copy of the complete text of Code § 8.01-374.1 is provided for the Court's convenience at Tab 1 of Appendix hereto.

consolidation would adversely affect the rights of the parties to a fair trial. The court may . . . make such orders concerning proceedings therein consistent with the right of each of the parties to a fair trial as may be appropriate to avoid unnecessary cost, duplicative litigation or costs.

B. To further convenience or avoid prejudice in such consolidated hearings, when separate or bifurcated trials wills be conducive to judicial economy, the court may order a separate or bifurcated trial of any claim, or any number of claims, cross-claims, counterclaims, third-party claims, or separate issue, always preserving the right of trial by jury. . . .

C. Any order entered pursuant to this section shall, for purposes of appeal, be an interlocutory order. Any findings of the court or jury in any bifurcated trial shall not be appealable until a final order adjudicating all issues on a specific claim or consolidate group of claims has been entered.

D. This section shall not apply . . . to any party defendant unless that defendant was was a manufacturer of, or a supplier of, asbestos or [asbestos-containing products], at any of the times alleged in the motion for judgment.

Prior to the enactment of Code § 8.01-374.1, there was no consolidation statute. In November 1991, Robert R. Hatten, a plaintiffs attorney in numerous asbestos cases in Newport News,[3] wrote then Virginia State Senator Bobby Scott and

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[3] Significantly, it was a Motion to Consolidate filed by Mr. Hatten's law firm in the Trial Court that resulted in the consolidation of the nearly 1300 cases at issue in this Petition.

asked him to sponsor legislation to allow Virginia courts to consolidate asbestos products liability actions for trial.[4] Mr. Hatten's proposed legislation was largely modeled after Federal Rule of Civil Procedure 42,[5] with two major differences: it was limited solely to asbestos products liability actions and applied only to a limited class of defendants.

The General Assembly enacted Code § 8.01-374.1 in 1992. The text of the statute was substantially the same as Mr. Hatten's proposal. Although Code § 8.01-374.1 originally provided that it would only remain in effect until June 30, 1995, that expiration date was later repealed.

In 1995, the Virginia General Assembly enacted a general consolidation statute -- the Virginia Multiple Claimant Litigation Act (Code § 8.01-267.1 et seq.) ("the Multiple Claimant Act" or "the Act").[6] The Act provides that "[o]n motion of any party, a circuit court may enter an order joining, coordinating, consolidating or transferring" any civil actions if it finds the following: (1) separate civil actions brought by six or more plaintiffs involving common questions of law or fact and arising out of the same transaction or occurrence; (2) the common questions of law or fact predominate and are significant to the action; and (3) the order will promote the ends of justice and efficiency without violating each party's right to due process or prejudice each party's right to a fair and impartial

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[4] See Letter from Robert R. Hatten, Esquire to State Senator Bobby Scott, dated November 20, 1991 and attachment thereto, Tab 2 of Appendix hereto ("Hatten Letter").

[5] See Hatten Letter.

[6] A copy of the complete text of the Virginia Multiple Claimant Litigation Act is provided for the Court's convenience at Tab 3 of Appendix hereto.

resolution. Code § 8.01-267.1(1)-(3). But unlike Code § 8.01-374.1, the Multiple Claimant Act specifically provides that orders of a circuit court consolidating claims for trial are appealable on an interlocutory basis. See Code § 8.01-267.8(1).

Although the Multiple Claimant Act is a comprehensive general consolidation statute, the General Assembly did not repeal or replace Code § 8.01-374.1 with its passage. Thus, Virginia has two statutes governing consolidations -- one for asbestos products liability actions and one for all other civil actions. Virginia is the only state to have singled out asbestos cases for such disparate treatment.

No published case has interpreted, discussed or relied on Code § 8.01-374.1. Indeed, the massive consolidation at issue here is the first in Virginia.[7]

**B. Procedural History of this Consolidation**

On June 20, 2000, the Trial Court issued a Memorandum Order concluding that the "most appropriate method of docket management" for the numerous asbestos cases pending on its docket was to use Code § 8.01-374.1 to consolidate and bifurcate the trials of those cases.[8] But in that same Order, the Trial Court also made this finding: ***"consolidation of all cases would adversely affect the rights of the parties to a fair trial."***[9] Nevertheless, on July 27, 2000, the Trial Court consolidated the cases:

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[7] The Trial Court previously abandoned an attempt to use Code § 8.01-374.1 to conduct a mass consolidated trial in 1992.

[8] See Memorandum of Order of the Honorable Robert W. Curran, dated June 20, 2000, Tab 4 of Appendix hereto.

[9] See id. at ¶ 3 (emphasis added).

> At the next docket call, which will be in September, every case that has my name on it is going to be consolidated and I'm going to set the trial for liability . . . [10]

> I'm going to consolidate all of my cases and then I'm going up and down the hall and I'm going to tell the other Judges that I'm going to consolidate on the issue of liability and if they want me to handle some of them, I may very well handle some of them. . . . What I want to do is to move as many of these cases along as fast as I can.[11]

The Trial Court then made clear that it would consider removing cases from the consolidated proceedings only on a very limited basis:

> Now, after I consolidate all of these, if someone can establish to me why these cases shouldn't be together - - and the only two reasons I think they shouldn't be together is if they didn't happen in Newport News - maybe that might be a problem- and maybe if the location was different. . . . But someone will have to convince me that I don't have to put them together. But if we're talking about liability, ***I don't think the disease is a significant factor.***"[12]

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[10] See Transcript of Proceedings before the Honorable Robert W. Curran, dated July 27, 2000, at 25-28, cited portions at Tab 5 of Appendix hereto.

[11] See id.

[12] See id. (emphasis added).

At its September 11, 2000 docket call, the Trial Court set the single consolidated trial of nearly 1300 asbestos cases in two phases. The first phase will purportedly determine "liability" issues; the second phase will purportedly determine issues of individual causation and damages.

Petitioner objected to the consolidation and bifurcation on the grounds that (1) consolidation would violate existing settlement agreements; (2) some cases were not yet mature for trial; (3) consolidation would confuse the jury; (4) consolidation would prejudice Defendants; (5) consolidation would violate Defendants' due process rights and right to a fair trial; (6) consolidation of these cases was in violation of Code § 8.01-374.1; and (7) consolidation would violate Virginia substantive tort law.[13] Even Plaintiffs' counsel

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[13] See Defendant Porter Hayden Company's Brief in Support of its Objection to Praecipe and Objection to Consolidation (Tab 6 of Appendix); Defendant GAF Corporation's Memorandum in Opposition to Motion to Consolidate (Tab 7 of Appendix); Defendant S. B. Decking's Motion to Sever Claims from Consolidated Trial or, in the Alternative, to Reconsider Trial Consolidation Plan (Tab 8 of Appendix); Defendant Borg-Warner Security Corporation's Brief In Support of Its Objections to Proposed Court-Ordered Consolidation (Tab 9 of Appendix); Defendant AlliedSignal, Inc.'s Objections to Court-Ordered Consolidation and Consolidated Trial Date (Tab 10 of Appendix); Defendant Hopeman Brothers, Inc.'s Objections to Proposed Court-Ordered Consolidation (Tab 11 of Appendix); Defendant Georgia-Pacific Corporation's Objection to Plaintiffs' Proposed Trial Plan (Tab 12 of Appendix); Defendant Mallinkrodt, Inc.'s Objection to Proposed Court Ordered Consolidation (Tab 13 of Appendix); Defendant A.P. Green Industries, Inc.'s Objection to Court-Ordered Consolidation (Tab 14 of Appendix); Defendant Harbison-Walker Refractories Company's Objection to Court-Ordered Consolidation (Tab 15 of Appendix); Defendant Viacom, Inc.'s Objection to Court-Ordered Consolidation (Tab 16 of Appendix); Defendant Champion International Corporation's Objection to Proposed Court Ordered Consolidation (Tab 17 of Appendix); Defendant Gasket Holdings, Inc.'s Objection to Court-Ordered Consolidation (Tab 18 of Appendix); Defendant W.R. Grace & Co.'s Objection to Court-Ordered Consolidation and Consolidated Trial Date (Tab 19 of Appendix).

suggested that the Trial Court might consolidate a smaller group of cases ranging from two to ten plaintiffs, and try those cases to final judgment so that the procedure could be appealed and "the Supreme Court can review what we're doing and tell us, [y]eah, you're on the right track or, [n]o, [h]ere is the way you should be doing it."[14] The Trial Court rejected these suggestions on the grounds that Code § 8.01-374.1 "puts [the decision] in the hands of the court."[15]

Thereafter, several proposals for handling the consolidated and bifurcated trial were presented to the Trial Court by all parties. In April 2000, the Trial Court indicated that information concerning individual plaintiffs' exposure histories, occupations, and diseases were not relevant to the liability phase of the consolidated trial.[16] For that reason, the Trial Court prohibited Defendants from conducting substantial discovery from Plaintiffs.[17] To this date, because of the strictures imposed by the Trial Court, less than twenty of the plaintiffs in the consolidated action have been deposed.

On June 7, 2001, the Trial Court finally issued an Order setting forth the issues to be tried in the liability phase of the bifurcated trial.[18] Those issues included: (1) whether a

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[14] See Transcript of Proceedings before the Honorable Robert W. Curran, dated December 14, 2000, at 12-15, cited portions at Tab 20 of Appendix hereto.

[15] See id. at 3-4.

[16] See Transcript of Proceedings before the Honorable Robert W. Curran, dated April 10, 2001, pp. 40-50, cited portions at Tab 21 of Appendix hereto.

[17] See, e.g., id.

[18] See Memorandum Order of the Honorable Robert W. Curran, dated June 7, 2001, Tab 22 of Appendix hereto.

particular defendant was involved in the design, manufacture, sale, distribution or installation of asbestos-containing products in the Newport News Shipyard during the period in question; (2) whether a particular defendant knew or had reason to know that the asbestos containing product was likely to be dangerous for the use it was supplied; (3) whether a particular defendant failed to provide adequate warnings of the dangers associated with ordinary and foreseeable uses of asbestos containing products; (4) whether a particular defendant breached any warranties with regard to any asbestos containing products; and (5) whether a particular defendant actively concealed and/or made misrepresentations to the public concerning the dangerous condition of asbestos-containing products and/or their use.[19] The Trial Court has given no other guidance as to how the consolidated trial will proceed on October 22, 2002; nothing has been said about how the causation and damages phases of the consolidated trial will be handled.

On November 14, 2001, Plaintiffs submitted a proposed order to the Trial Court listing the specific cases to be tried in the consolidated trial.[20] The proposal included all asbestos cases pending before the Trial Court in which Plaintiffs were represented by the Law Office of Peter T. Nicholl, and in which defendants had been served by January 23, 2001 -- approximately 1297 cases.[21]

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19 See id.

20 See Notice of Presentation and Proposed Order, dated November 14, 2001, Tab 23 of Appendix hereto.

21 A separate mass consolidated trial is scheduled to begin in May 2002 for those cases in which the Plaintiffs are represented by a different law firm.

On November 30, 2001, Petitioner filed objections to the proposed order[22] and moved the Trial Court to reconsider its consolidation order.[23] Petitioner argued that the proposed consolidation would be prejudicial to Defendants, would violate Defendants' constitutional rights, and was in direct violation of Code § 8.01-374.1. Specifically, Petitioner asserted that:

- The Court does not have the authority to order this consolidation pursuant to Code § 8.01-374.1 because the plain language of that statute only applies to asbestos products liability actions and cannot be used to consolidate cases against contractors who used or installed asbestos-containing products. Furthermore, the statute expressly prohibits consolidation if it will "adversely affect the rights of the parties to a fair trial." Common sense, the experience of other courts that have attempted consolidations and social science studies establish that a consolidation of this type and magnitude will prejudice the Defendants.

- A consolidation of this type and magnitude is a clear violation of Defendants' rights to a fair trial and due process under the Virginia and United States Constitutions because the cases lack the commonality required to constitutionally order consolidation, the number of cases to be consolidated far exceeds constitutional limitations, and the consolidation will not result in any actual efficiency or conservation of resources.

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22 See Defendant Hopeman Brothers' Objection to Plaintiffs' Proposed Order and Motion to Reconsider Order Consolidating All Asbestos Cases, dated November 30, 2001, Tab 24 of Appendix hereto.

23 See id.

- Defendants will suffer imminent and immediate harm if forced to proceed with this consolidation. In other cases where courts have proceeded with similar consolidations, they have been almost universally reversed on appeal or compelled by higher courts to abandon the consolidation by writs of mandamus or writs of prohibition.

- The Court has numerous other options available to it to effectively and efficiently manage its asbestos docket. These other options have been used by other jurisdictions and protect the rights of the litigants involved. Other defendants joined in Petitioner's Objection and Motion to Reconsider.

On December 11, 2001, the Trial Court heard argument on Petitioner's motion to reconsider. Petitioner urged the Trial Court to investigate and make findings regarding the commonality of the cases to be consolidated.[24] Petitioner also sought a stay to allow for an appeal in the event the Trial Court re-affirmed its consolidation order.[25]

The Trial Court denied the Motion to Reconsider:

> I don't think - - I just don't think all of this has convinced me there's any unfairness to this, and I think a lot of the argument today has to do with the second phase. So this Court is overruling any motion to not enter this Order.[26]

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[24] See Transcript of Proceedings before the Honorable Robert W. Curran, dated December 11, 2001, at 7-9, cited portions at Tab 25 of Appendix hereto.

[25] See id. at 18.

[26] See id. at 30.

The Trial Court set the consolidated trial on the issue of liability to begin on February 27, 2002 and signed Plaintiffs' proposed order without substantial modification. Subsequently, the trial date was continued until October 22, 2002 on Plaintiffs' motion. At present, 1296[27] plaintiffs' claims against 25 defendants are to be determined in the mass consolidated trial.

## III. STANDARD FOR ISSUING WRIT OF MANDAMUS

This Court has original jurisdiction over cases of mandamus. Va. Const. art. 6, § 1; Code § 17.1-309. Though a writ of mandamus is an extraordinary remedy, it is appropriate here because ordering a consolidation that violates parties' constitutional and statutory rights is sufficiently egregious conduct that appellate courts have routinely granted extraordinary relief to prevent such consolidations from proceeding. See, e.g., In re Repetitive Stress Injury Litig., 11 F.3d 368, 372 (2d Cir. 1993) (writ of mandamus granted ordering trial court to vacate proposed consolidation of 44 cases for trial); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (writ of mandamus granted because proposed plan for second phase of trial was outside court's authority).

A writ of mandamus is used to "compel . . . inferior courts . . . to perform some particular duty incumbent upon them, and which is imperative in its nature, the performance of which the relator has a clear legal right, without any other adequate specific legal remedy, to enforce it." Richmond-Greyhound Lines, Inc. v. Davis, 200 Va. 147, 151, 104 S.E.2d 813, 817 (1958). Although mandamus is "not awarded as a matter of right but in the exercise of sound judicial

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[27] Plaintiffs' proposed order originally contained 1297 cases for consolidation. One case has since been voluntarily severed from the consolidation by the parties.

discretion," it is appropriate where, as is the case here, the right involved and the duty sought to be enforced are clear and certain and where there is no other available specific and adequate remedy. See id.; see also Hertz v. Times World Corp., 259 Va. 599, 607-08, 528 S.E.2d 458, 463 (2000).

A writ of mandamus should issue where (1) the Petitioner has a clear and specific legal right to the relief sought; (2) the Trial Court has a clear ministerial duty which ought to be and can be performed; and (3) the Petitioner has no specific and adequate legal remedy. See Hertz, 259 Va. at 608, 528 S.E.2d at 463; Gilliam v. Harris, 203 Va. 316, 318, 124 S.E.2d 188, 190 (1962). Additional considerations include the urgency prompting the exercise of discretion, the interests of the public and third persons, the results which would follow upon a refusal of the writ, and the promotion of substantial justice. See Hertz, 259 Va. at 607, 528 S.E.2d at 462 (quoting Davis, 200 Va. at 151, 104 S.E.2d at 816); Gannon v. State Corp. Comm'n, 243 Va. 480, 482, 416 S.E.2d 446, 447 (1992). The writ should issue here.

## IV. ARGUMENT

### A. Petitioner Has Clear and Specific Constitutional and Statutory Rights That Will Be Violated If Mandamus Is Not Granted.

Petitioner and the other defendants in this consolidated action have clear and specific rights to a fair trial and due process of law which will be violated in this mass consolidated trial. Petitioner is guaranteed due process under both the United States Constitution and the Virginia Constitution. U.S. Const. amend. XIV, § 1; Va. Const. art. 1, § 1. The right to due process includes "a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (interpreting federal constitution's guarantee of due process); Burts v. Burts, 227 Va. 618, 619, 316 S.E.2d 745, 746 (1984) (interpreting right to due process guaranteed under the Virginia constitution). Due process also requires

a "fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955); Strickland v. Washington, 466 U.S. 668, 684-85 (1984). Petitioner's right to a fair trial is further guaranteed under the Seventh Amendment to the United States Constitution. See U.S. Const. amend. VII; see also Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 354 (2d Cir. 1993).

The joinder of claims -- or consolidation of cases -- that are not sufficiently related violates a litigant's rights to process and a fair trial. See, e.g., Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 906 (4th Cir. 1983) (en banc); Satcher v. Commonwealth, 244 Va. 220, 269, 421 S.E.2d 821, 850-51 (1992) (Hassell, J., dissenting) (citing Ham v. South Carolina, 409 U.S. 524 (1973)). The Trial Court has been provided with substantial evidence that these cases are not sufficiently related to constitutionally order their consolidation. Moreover, the Trial Court has made no findings as to the commonality of these actions. Additionally, a consolidated trial of this size -- nearly 1300 cases -- will overwhelm the jury and make rational distinctions between the various defendants and plaintiffs impossible. Such a situation does not provide a "meaningful opportunity to be heard" or a "fair trial."

Although the Trial Court relies on a Virginia statute in consolidating these cases, a Virginia statute cannot overturn either the State Constitution or Federal Constitution. Federal law is clear - - a consolidation of this type and magnitude violates the United States Constitution; and it violates the analogous provisions of the Virginia Constitution.

A proper consolidation typically requires the convergence of three factors: First, the cases to be consolidated must share common questions. Second, the cases to be consolidated must not be so numerous so as to become "unmanageable." Third, the consolidation must result in convenience and efficiency for the parties and the

Court. These three factors have been ignored here. Moreover, upon examination they cut against consolidation.

1. These Cases Lack the Commonality Necessary to Order Consolidation.

Several courts have specifically held that consolidations of asbestos cases, such as this one, violated defendants' constitutional rights because the cases lacked the commonality necessary to order consolidation. See, e.g., Malcolm, 995 F.2d 346 (holding that consolidation of 600 asbestos cases, resulting in jury trial of 48 cases at a time, violated defendants' Seventh Amendment rights); In re Fibreboard Corp., 893 F.2d 706, 709-12 (5th Cir. 1990) (discussing arguments that consolidation of 3,000 asbestos cases would violate defendants' Fourteenth Amendment due process rights and Seventh Amendment right to a fair trial, in holding that consolidation was improper); Cain v. Armstrong World Indus., 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) (holding that consolidation of 13 asbestos cases violated defendants' constitutional right to a fair trial).

The United States Supreme Court addressed the lack of commonality among asbestos cases in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). There, the Court upheld the Third Circuit's decision to vacate a Federal Rule of Civil Procedure 23 class action certification of a nationwide settlement class of all current and future asbestos-related claims because plaintiffs' claims were not sufficiently common. Id. at 597. The Court noted that the only thing common about the proposed class of plaintiffs' claims was that each plaintiff alleged adverse effects from "past exposure to asbestos products manufactured by one or more of 20 companies." Id. The Court held that this characteristic alone was not enough to establish the predominance of common issues necessary to certify a Rule 23 class. Rather, the Court held that commonality did not exist because:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

Id. at 624 (quoting the Third Circuit's opinion in the same case).

To ensure that constitutional rights are protected, courts often look at seven aspects of a case to determine whether there is sufficient commonality to consolidate asbestos cases: (1) common worksites; (2) similar occupations; (3) similar duration and time period of exposure; (4) same disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; and (7) whether all plaintiffs are represented by the same counsel. See, e.g., Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990); Malcolm, 995 F.2d at 354; In re All Asbestos Cases Pending in the United States District Court for the District of Maryland (D. Md. Dec. 6, 1983) (en banc) (unreported); see also In re Repetitive Stress Injury Litig., 11 F.3d at 374 (non-asbestos case citing these seven criteria). If these criteria are not met then commonality is not established and a proposed consolidation will violate a defendant's constitutional rights to a fair trial and due process. See id.

The Trial Court never made a finding of commonality and failed to consider the myriad differences among the cases[28] before combining virtually every asbestos case on its

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[28] The only criterion that is met in this consolidation is that Plaintiffs are represented by the same counsel.

docket into one huge action. In fact, the one finding that the Trial Court did make -- that "consolidation of the cases would adversely affect the rights of the parties to a fair trial" -- was directly contrary to its present actions.

Similar to the plaintiffs in Amchem, the only thing "common" about these cases is that Plaintiffs allege that asbestos caused them injury and they have all been filed in Newport News. Although the majority of the plaintiffs in this matter allege exposure at Newport News Shipyard and Dry Dock Company ("the Shipyard"), many allege exposure at dozens of other sites in addition to the Shipyard. Some allege minimal exposure at the Shipyard, with substantial exposure at other locations. Indeed, several plaintiffs never worked at the Shipyard.

The plaintiffs worked in dozens of different occupations (from security guards to welders and insulators), some directly with asbestos-containing products while others were simply by-standers. The plaintiffs worked during markedly different time periods (ranging from the 1930s to the 1990s), and for various exposure periods (ranging from as little as three months to more than five decades). The plaintiffs, some living and some dead, allege a variety of different diseases, including mesothelioma, lung cancer, colon cancer, asbestosis, and pleural plaque disease.

Plaintiffs have not presented the Trial Court with any evidence regarding commonality and the Trial Court has truncated discovery on many of these very issues stating that they are irrelevant to the first phase of the consolidated trial.[29] As such, the Trial Court has prevented defendants from examining the basis of plaintiffs' diagnoses of asbestos-related diseases. Indeed, many of these plaintiffs base their claims on nothing more than a "mass screening"

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[29] See Tab 21 of Appendix hereto.

diagnosis instituted at the behest of Plaintiffs' counsel. The screenings result in a report -- that is sent to Plaintiffs' counsel, not the individual plaintiffs -- stating simply that a plaintiff's x-ray reading is "consistent with" an asbestos related disease. These plaintiffs have never been told by their regular physicians that they have an asbestos-related disease, have never been treated for an asbestos-related disease, and have no symptoms of an asbestos-related disease. Judge Charles Weiner of the United States District Court for the Eastern District of Pennsylvania, who presides over the federal Multidistrict asbestos litigation ("MDL"), recently administratively dismissed all cases pending in the MDL that were based on such screenings.[30] In doing so, Judge Weiner noted that these type of diagnoses are made without a doctor-patient relationship and result in the depletion of resources for deserving plaintiffs. The Trial Court, in this consolidation, however, is forcing defendants to expend untold resources defending the first phase of the consolidated trial without any proof that the plaintiffs have legitimate claims or diagnoses.

By insisting upon consolidating such a large number of disparate cases, the Trial Court has made it impossible to apply Virginia liability law. For example, the duty owed by a manufacturer or supplier cannot be determined without knowing the employer of a given plaintiff. Under Virginia law, there is no duty on product suppliers to warn employees of knowledgeable industrial purchasers of product-related hazards. See Goodbar v. Whitehead Bros., 591 F. Supp. 552 (W.D. Va. 1984) (applying Virginia law). Furthermore, because foreseeability is a central factor in determining the duty owed by a manufacturer or distributor

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[30] See Order of Judge Charles R. Weiner, dated January 14, 2002, at Tab 26 of Appendix hereto. Plaintiffs can reinstate their cases pursuant to the Order if they come forward with a credible diagnosis of an asbestos-related disease.

of products, liability will further depend on the occupation of any given plaintiff, the duration of his exposure and the nature of his contact with asbestos-containing products (i.e., whether he worked directly with the product, was a bystander, or was a household member of a worker who allegedly brought asbestos home on his or her clothing). To exclude all of these factors from the liability phase, is to impermissibly determine liability in a vacuum.

2. The Number of Cases Consolidated Violates Constitutional Limitations and Constitutes a De Facto Class Action.

In addition to the lack of commonality, the sheer number of cases that have been consolidated is impermissibly large. It is significantly higher than cases found by other courts to have violated defendants' constitutional rights. And, the consolidation of 1296 cases is unprecedented in Virginia -- a state that does not permit class actions. See Heirs of Roberts v. Coal Processing Corp., 235 Va. 556, 556, 369 S.E.2d 188, 188 (1988); Almeter v. Virginia Dep't of Taxation, 2000 WL 1687589, at *1 (Va. Cir. Ct. 2000).

Courts contemplating consolidation must "take into account the number of cases affected." See Malcolm, 995 F.2d at 352. In Baker v. Waterman Steamship Corp., the court held that the consolidation of only *two* cases was inappropriate where one plaintiff was more severely injured than the other. 11 F.R.D. 440, 441 (S.D.N.Y. 1951). In Cain, the Southern District of Alabama specifically criticized the "Try-as-many-as-you-can-at-one-time approach" and granted defendants' motions for new trial after a consolidated trial of only *thirteen* asbestos personal injury cases. See 785 F. Supp. at 1456. In doing so, the court noted that the number of cases consolidated and the resulting amount of evidence to be considered by the jury prejudiced the defendants and made the consolidation unworkable. See id. In In re Repetitive Stress Injury Litig., the court held

that the consolidation of **44** cases would violate the parties' right to a fair trial. 11 F.3d at 373-74. In those cases where courts have upheld consolidations, the number of cases consolidated has been extremely low. See Johnson, 899 F.2d 1281 (consolidation of *two* cases upheld); Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492 (11th Cir. 1985) (*eleven* cases).

In Virginia's long history, there has never been a consolidation anywhere near this size.[31] While Code § 8.01-374.1 clarifies a court's authority to consolidate, it does not and cannot authorize a trial court to violate a defendant's constitutional rights. The General Assembly could not have contemplated that this statute would be put to the use that the Trial Court has made of it.

Significantly, the consolidation of nearly 1300 cases for trial is equivalent to a class action. But Virginia law continues to reject class actions. See Coal Processing Corp., 235 Va. at 559, 369 S.E.2d at 189; Almeter, 2000 WL 1687589, at *1. Code § 8.01-374.1 cannot be used as a backdoor around this well established principle.

The Trial Court has exceeded its statutory and constitutional authority and has violated specific rights of Petitioner by ordering a consolidated trial of this size. Mandamus is required here to protect Petitioner's rights.

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[31] Even in consolidations with only two plaintiffs, this Court noted prior to the enactment of § 8.01-374.1 that it would not consolidate cases in which one plaintiff was living and one was dead. See Letter from the Honorable Robert W. Curran to Jonathan A. Smith-George et. al., dated December 11, 1999, at Tab 27 of Appendix hereto. Other Virginia courts have held similarly. See Amax Concrete Corp. v. Isom, 1990 WL 751061, at *1 (Va. Cir. Ct. 1990).

3. This Consolidation Will Be Unworkable and Inefficient.

The Trial Court's stated concerns of convenience and efficiency cannot override the paramount requirement of protecting the parties' constitutional rights. See Lewis v. ACB Bus. Servs. Inc., 135 F.3d 389, 412-13 (6th Cir. 1998); Malcolm, 995 F.2d at 350. However, this consolidation does not even serve the purposes of convenience and efficiency. See, e.g., E.E.O.C. v. HBE Corp., 135 F.3d 543, 551 (8th Cir. 1998); In re Eli Lilly & Co. v. Oraflex Prods. Liab. Litig., 578 F. Supp. 422, 423 (J.P.M.L. 1984).

Mass consolidations inevitably result in a period of years where not a single case is tried. See Thomas E. Willging, Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group, 187 F.R.D. 328, 334 (1999) (citing the experience of the courts in Cimino v. Raymark Indus., 749 F. Supp. 649, 650 (E.D. Tex. 1990), rev'd , 151 F.3d 297 (5th Cir. 1998) and Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997)). In fact, the last year and a half of the instant matter has been spent litigating the propriety of the proposed consolidation rather than the merits of any single plaintiff's case. In that time, the mechanics of how the consolidated trial will proceed have not been resolved. If and when a trial does finally occur, the trial will be lengthy and inefficient due to the volume of evidence necessary to establish liability against approximately 25 defendants. Furthermore, the vast majority of mass consolidations are reversed on appeal or new trials are ordered. In the end, the consolidation burdens the court, wastes resources, and causes greater delays than individual trials.

The Circuit Court for the City of Baltimore's experience with mass asbestos consolidation in Abate v. ACandS, Inc., Cause Nos. 89236704 and 93076701, is illustrative of the complete failure of mass consolidations to result in any actual efficiency or convenience. The 1990 Abate

consolidation involved more than 8,500 plaintiffs and 15 defendants. Cross-claims and third-party claims were severed from the first trial and tried in a separate consolidated trial. It took more than five years from the date of consolidation, and at least one failed trial, until completion of only the "common issues" portion of the trials. It was almost another five years, after various post-trial motions and appeals, until the first "second phase" trial began. The second phase trials are still ongoing. In the approximately ten years since the Abate proceedings began, several of the defendants have gone bankrupt and many of the plaintiffs have died. Significantly, even with more than 10,000 asbestos cases now pending on its docket, the Circuit Court for the City of Baltimore has not ordered another mass consolidation of asbestos cases.

Courts in other jurisdictions have similarly refused to consolidate the asbestos cases pending on their dockets for a single mass trial. The Circuit Court of Cook County, Illinois recently denied plaintiffs' counsel's motion to consolidate approximately 500 asbestos cases pending in that jurisdiction.[32] In doing so, the judge noted that the word "impractical" is too "benign" a term to describe the reasons why all of the asbestos cases should not be consolidated.

**B. The Trial Court Has a Clear, Non-Discretionary Duty to Abide By the Requirements of Code § 8.01-374.1 and the Virginia and United States Constitutions.**

The Trial Court has a non-discretionary duty to protect the constitutional rights of parties before it. As described in detail above, the Trial Court has breached clear and specific constitutional rights of Petitioner and the other defendants in this consolidated action. In addition to these

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[32] See Order of Judge Mary Mulhern, dated January 30, 2002, at Tab 28 of Appendix hereto.

constitutional duties, the Trial Court has a clear, non-discretionary duty to abide by the requirements of the statute under which it purports to consolidate these actions. Mandamus is appropriate to compel a trial court judge to comply with the mandate of a statute. See, e.g., In re Commonwealth of Virginia, 229 Va. 159, 163, 326 S.E.2d 695, 698 (1985) (granting writ of mandamus to compel trial judge to abide by sentencing statute).

Code § 8.01-374.1 mandates that it only be applied to civil actions "against manufacturers or suppliers [products liability] of asbestos or products for industrial use that contain asbestos." See Code § 8.01-374.1(A). It further mandates that it cannot be used if to do so will "adversely affect the rights of the parties to a fair trial." See Code § 8.01-374.1(A). The Trial Court has specifically ignored these requirements in ordering this consolidation.

1. The Trial Court Does Not Have the Authority to Consolidate Products Liability Cases With Non-Products Liability Cases Under Code § 8.01-374.1.

Many of the defendants in this consolidation are not manufacturers or suppliers of asbestos-containing products. The plain language of Code § 8.01-374.1 states that it ***"shall not apply to any party defendant unless that defendant was a manufacturer of, or supplier of, asbestos or products for industrial use that contain asbestos, at any of the times alleged in the motion for judgment."*** Code § 8.01-374.1(D) (emphasis added). Yet, in direct violation of the statutory mandate, the Trial Court has ordered this consolidation with full knowledge that many of the defendants are not and never were manufacturers or suppliers of asbestos or asbestos-containing products.

When the language of a statute is clear and unambiguous, "there is no need for construction by the court; the plain meaning and intent of the enactment will be given it." See Brown v. Lukhard, 229 Va. 316, 321, 330

S.E.2d 84, 87 (1984). If the words are clear, a court must "take the words as written" and give them their plain meaning. [33] See Ervin B. Davis & Co. v. Dep't of Crim. Justice Servs., 49 Va. Cir. 447, 1999 Va. Cir. LEXIS 365 (citing Brown, 229 Va. at 321, 330 S.E.2d at 87). The plain language of Code § 8.01-374.1 controls.

By its plain language, Code § 8.01-374.1 only applies to products liability actions. It does not apply to civil actions against premises owners for exposure to asbestos on their property, to claims against independent contractors or subcontractors who used or installed asbestos-containing products, or to indemnity or third-party claims. See id. Like Federal Rule of Civil Procedure 42, the central premise of Code § 8.01-374.1 is that consolidation should only be ordered for cases with common issues.[34] See Brewer v. Republic Steel Corp., 513 F.2d 1222 (6th Cir. 1975); Hasman v. G.D. Searle & Co., 106 F.R.D. 459 (E.D. Mich. 1985). The present consolidation fails to achieve this purpose.

Virginia law has different standards for establishing liability against a premises owner for a dangerous condition on his property versus a manufacturer or distributor of a defective or dangerous product. A premises owner has a duty to use ordinary care to keep his premises "reasonably safe" for those who enter with his knowledge and permission, including employees of independent contractors working on his premises. See Franconia Assocs. v. Clark, 250 Va. 444, 446, 463 S.E.2d 670, 672 (1995); Davis Bakery, Inc. v. Dozier, 139 Va. 628, 630, 124 S.E.2d 411, 413 (1924). In

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[33] This is especially true here, where although Code § 8.01-374.1 was enacted in 1992, no published case has interpreted or discussed that statute.

[34] The legislative history of Code § 8.01-374.1 suggests that it was "closely modeled" after Federal Rule of Civil Procedure 42. See Legislative Summary of Code § 8.01-374.1, Tab 29 of Appendix hereto.

a premises liability suit, the plaintiff must show that the property owner had actual or constructive knowledge of a defective condition on his premises to establish a prima facie case of negligence. See Roll ' R' Way Rinks, Inc. v. Smith, 218 Va. 321, 327, 237 S.E.2d 157, 161 (1977).

In a products liability action, however, the knowledge of the manufacturer or distributor that the product might be defective or dangerous is only at issue in a "failure to warn" case. In a design defect or manufacturing defect case, the plaintiff must only show that the goods were unreasonably dangerous for their ordinary or foreseeable uses, and that the unreasonably dangerous condition existed when the goods left the defendant's hands. See Logan v. Montgomery Ward & Co., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975). In a failure to warn case, the plaintiff must show that the manufacturer or distributor had "reason to know" that the product was dangerous, had no reason to believe that users would realize its dangerous condition, and failed to exercise reasonable care in warning them of the danger.[35] See Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 134, 413 S.E.2d 630, 634 (1992); Featherall v. Firestone Tire and Rubber Co., 219 Va. 949, 962, 252 S.E.2d 358, 366 (1979).

Furthermore, independent contractors and subcontractors have a less stringent duty to warn of the potential hazards of products with which they work than do manufacturers, suppliers or premises owners. See ACandS,

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[35] The evidence necessary to establish liability under a failure to warn theory will also differ depending on whether the defendant is a manufacturer or a distributor. A manufacturer has more "reason to know" that a product it manufactures is dangerous than a distributor of the same product. This is especially true if the failure to warn begins with the manufacturer. A distributor or supplier has no independent duty to inspect or test a product. Featherall v. Firestone, 219 Va. at 962, 252 S.E.2d at 634; see also 62 Am. Jur. 2d Products Liability § 332 (1984).

Inc. v. Abate, 710 A.2d 944 (Md. 1998). Other issues may also arise in cases involving independent contractors. For example, if the plaintiff is an employee of another independent contractor, his claims may be limited to Workers' Compensation benefits. See Code § 65.2-307; Smith v. Horn, 232 Va. 302, 304-08, 351 S.E.2d 14, 15-18 (1986); Henderson v. Central Tel. Co., 233 Va. 377, 355 S.E.2d 596 (1987). Furthermore, independent contractors may have defenses unavailable to premises owners or manufacturers and suppliers, such as a "government contractor" defense. See generally Boyle v. United Techs., 487 U.S. 500 (1988).

Several of the defendants in the nearly 1300 cases that the Court has consolidated are not manufacturers, distributors or suppliers of asbestos-containing products. For example, in its Motion to Sever Claims from Consolidated Trial, or in the Alternative, to Reconsider Trial Consolidation Plans, Defendant S.B. Decking, Inc. asserts that it was not a manufacturer or distributor of asbestos-containing products.[36] Rather, it was a contractor that installed asbestos-containing products.[37] Similarly, Defendant ACandS, Inc. was a contractor that allegedly installed asbestos-containing products -- not a manufacturer, distributor or supplier. The claims against these defendants are based on theories of liability other than products liability. Therefore, the Trial Court does not have the authority to order the consolidation of these cases under Code § 8.01-374.1.

The rationale for limiting consolidations under Code § 8.01-374.1 to one theory of liability -- products liability -- is obvious: a consolidation with several different theories of

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36 See Tab 8 of Appendix hereto.

37 See id.

liability requires the jury to apply different rules of law to a variety of subsets of defendants. Consequently, the commonality that would make consolidation appropriate and constitutionally sound is lost. The Trial Court, therefore, cannot use Code § 8.01-374.1 to consolidate all asbestos cases pending in the City of Newport News.

2. This Consolidation Will Prejudice Petitioner and All Defendants and Adversely Affect Their Rights to a Fair Trial.

Moreover, as an overriding mandate, Code § 8.01-374.1 prohibits consolidation if it would "adversely affect the rights of the parties to a fair trial." The Trial Court has itself found that consolidation of all of the asbestos cases on his docket would, in fact, "***adversely affect the rights of the parties to a fair trial.***"[38] Yet the Trial Court did not act on this finding. A court cannot be permitted to effectively acknowledge that its conduct violates a statute and then proceed to violate the statute anyway.

Scientific studies and the experience of other courts that have attempted mass consolidations show that juries cannot possibly keep track of the different parties, claims, evidence, and legal theories in a consolidated action of this magnitude. The result is a real and quantifiable prejudice to defendants. The Trial Court's proposed bifurcation will only compound this prejudice.

Empirical studies establish that consolidation substantially prejudices defendants. For example, studies show that:

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[38] See Tab 4 of Appendix hereto (emphasis added).

- In consolidated trials, juries are unable to distinguish the injuries of the most severely injured plaintiffs from those who are virtually unscathed.[39]

- The cumulative effect of consolidation is to significantly raise the average damage amount awarded to plaintiffs.[40]

- As the population of known plaintiffs increases in consolidated proceedings, juries are more likely to blame the defendants for injuries.[41]

- Consolidation alters the patterns of verdicts and awards handed down by juries. Although these changes are potentially relevant for both sides, they are generally more favorable to plaintiffs and more prejudicial to defendants.[42]

- Even in traditional "two litigant" toxic tort cases, "juries are unable to comprehend the principle that exposure to a toxic chemical dosage of one part-per-billion produces a different biological effect than exposure to the same chemical at one

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39 See Kenneth S. Bordens & Irwin A. Horowitz, The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?, 22 Law & Psychol. Rev. 43 (1998) (relying on statistical analysis of the actual jury verdicts in Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990) and their own simulated consolidated trials).

40 Id. at 59.

41 Id.

42 Id. at 66.

part-per-million." Studies show that juries believe that "a poison, is a poison, is a poison."[43]

- Even in single party litigation, juror comprehension of jury instructions is extremely low.[44]

The experience of trial courts that have attempted mass consolidations supports the findings of social scientists. Juries consistently award higher total compensatory and punitive damages in consolidated cases. See, e.g., Cain v. Armstrong World Indus., 785 F. Supp. 1448 (S.D. Ala. 1992). In Cain, a consolidated trial of thirteen asbestos cases, the jury awarded compensatory damages that were nearly 10 times higher than the average award for other asbestos cases in the same district. Id. at 1454. In granting the defendants' motions for a new trial, the court held that the "compensatory damages awarded . . . not only shock the judicial conscience but also persuade the court that the jury verdicts were prejudiced by the joinder of all these actions." Id. at 1451-52. The Cain court further noted that the jury was unable to differentiate between those plaintiffs that were suffering from serious illness and those that were not -- the jury simply awarded all plaintiffs the same amount of damages no matter what their injury. Id. at 1455.

Juries also have difficulty assigning fault among the numerous named defendants in consolidated actions; they tend to apportion liability equally. See, e.g., Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993). In

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[43] See Dan Drazan, The Case for Special Juries in Toxic Tort Litigation, 72 Judicature 292 (1989) (citing scientific studies of juror comprehension). The phenomenon cited would be exponentially multiplied where as here, there are 1296 plaintiffs who were allegedly exposed to such a "poison."

[44] See Walter W. Steele & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. Rev. 77, 84-87 (1988) (citing their own studies and numerous other studies and experiments).

Malcolm, a consolidated trial of 48 asbestos cases, the jury equally apportioned nine percent liability to all defendants despite strong evidence against some defendants and little evidence against others. See id. at 352. As the Malcolm court observed, the equal apportionment of liability in the face of such a complex case, "amounted to the jury throwing up its hands in the face of a torrent of evidence." Id.

The prejudice to Petitioner and all Defendants from this consolidation will only be compounded by the Trial Court's proposed bifurcation of the trial. Studies show that:

- Separation of trial issues through bifurcation alters the outcome of trials because juries are unable to establish "narratives" that allow them to sort evidence in complex cases.[45]

- Bifurcated trials result in higher damages awards to plaintiffs than traditional single plaintiff trials.[46]

- In bifurcated trials where juries try the issue of liability before causation, more pro-plaintiff verdicts are reached than if causation is tried first.[47]

By disallowing all evidence of individual causation, including disease processes, exposure history and duration, and occupation, from the liability phase of the trial, the jury must, in effect, determine liability in a vacuum.

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[45] See Irwin A. Horowitz & Kenneth S. Bordens, Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions, 73 Judicature 22, 26 (1989).

[46] See id.

[47] See id. The scientific rationale for this result is that once a jury renders a difficult decision against a defendant, subsequent anti-defendant decisions are more easily made.

**C. Petitioner Has Exhausted All Remedies and Has No Adequate Remedy at Law.**

Mandamus is only appropriate if Petitioner has exhausted all available remedies and has no other adequate remedy at law. See Goldman v. Landsidle, 262 Va. 364, 371, 552 S.E.2d 67, 71 (2001); Gannon v. State Corp. Comm'n, 243 Va. 480, 482, 416 S.E.2d 446, 447 (1992). However, "[t]he adequate remedy which will bar mandamus must be such as reaches the end intended, and actually compels the performance of the duty in question." Carolina C & O. Ry v. Bd. of Supervisors of Scott County, 109 Va. 34, 35, 63 S.E. 412, 413 (1909). The other remedy also "must be equally as convenient, beneficial and effective as the proceeding by mandamus." Id. Moreover, even if Petitioner may have another legal remedy, "if such remedy be obsolete or inoperative, the mandamus will be granted." See Richmond-Greyhound Lines, Inc. v. Davis, 200 Va. 147, 152, 104 S.E.2d 813, 817 (1958).

Petitioner has exhausted all remedies before the Trial Court and has no remaining adequate remedies at law. Petitioner now requires the intervention of this Court to prevent the imminent and irreparable harm that will befall it should this consolidated trial take place. Unless this Court intervenes through the exercise of its mandamus powers, Petitioner's right to a fair trial and due process of law will be forever denied and its business will be placed in peril.

The Trial Court first issued its order to consolidate on July 20, 2000. Since that time, Petitioner, and nearly all other defendants, have made repeated objections to the Trial Court's consolidation order on the same grounds that Petitioner presents to this Court. Most recently, on November 30, 2001, Petitioner filed a Motion to Reconsider the Trial Court's consolidation order and presented argument to the Trial Court on December 11, 2001. All objections and arguments against the consolidation order

have been soundly and summarily rejected by the Trial Court without satisfactory explanation.[48] Further presentation of argument or evidence to the Trial Court would be futile, leaving Petitioner with no choice but to petition for writ of mandamus from this Court to compel the Trial Court to do that which the law and his ministerial duty requires of him.

Petitioner has no direct route of appeal in this case. Code § 8.01-374.1 attempts to cut off judicial review. Significantly, were these actions consolidated under Virginia's general consolidation statute, Petitioner would have a right to directly appeal the consolidation order to this Court. See Code § 8.01-267.1. Petitioner asserts that the General Assembly had no "rational basis" for providing differential treatment only to asbestos products liability actions by cutting off appellate review for asbestos cases while allowing it for every other kind of case in the Commonwealth. Because the statute does not contemplate a method of review, the issuance of a writ of mandamus is the only available remedy to Petitioner.

Given the language of Code § 8.01-374.1, if this Court does not intervene, Petitioner will be forced to take this case to trial and wait years before the violation of its constitutional and statutory rights can even be addressed. To be forced to proceed with a massive trial that will take months or years to complete is not "an adequate remedy" for Petitioner and the other defendants in this action.

Moreover, if the Trial Court's order to consolidate is not vacated prior to trial, whatever outcome results will inevitably be reversed upon appeal. As a result of prejudice

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[48] Indeed, the Trial Court has offered no written opinion in support of this consolidation and has simply denied all objections from the bench without further consideration.

to defendants and violations of constitutional rights, appellate courts have often reversed or ordered new trials for consolidations involving fewer plaintiffs and issues of less complexity than that at issue here. See Malcolm, 995 F.2d at 354 (reversed and remanded); Cain, 785 F. Supp. at 145 (ordering new trial after verdict); Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976) (ordering new trial). Thus, if the Trial Court is not compelled to reverse its order now, it will almost certainly be compelled to do so once the trial is completed. That remedy, however, will come too late to be of use to Petitioner and the other defendants whose constitutional rights are in imminent danger of violation. It will come too late for Plaintiffs who will have already undergone years of litigation only to have the outcome jettisoned on appeal. And it will come too late to spare an already over-taxed docket the administrative expense of trying a case it will only have to try again in smaller pieces.

The nearly 1300 plaintiffs in the consolidated action ordered by the Trial Court worked in dozens of different jobs during markedly different time periods, and allege varying degrees of exposure to asbestos in varying locations that allegedly caused the development of a host of diseases including mesothelioma, lung cancer, asbestosis, and pleural plaque disease. Simply put, it will be years before this complex action can be tried to a conclusion from which any of the parties might appeal. Mandamus is required because Petitioner's only other remedy, appeal and re-trial, is inadequate and unfair to all parties.

**D. The Court Should Exercise its Discretion to Issue a Writ of Mandamus To Halt This Unprecedented Consolidation.**

Petitioner has shown all three elements necessary for this Court to issue a writ of mandamus. See Davis, 200 Va. at 151-52, 104 S.E.2d at 816 (1958). The Court may consider additional factors, however, in deciding whether to exercise

its discretion in issuing mandamus. See id. These factors may include the urgency of the situation which prompts the Court's exercise of its discretion, the interests of the public and third persons, the results which will follow upon refusal of the writ, and the promotion of substantial justice. See id. These factors and others weigh in favor of granting Petitioner's request for mandamus.

The purported benefit of a mass consolidation is efficiency and conservation of judicial resources. Rather than producing judicial economy, however, mass consolidations may actually encourage the filing of additional claims. In jurisdictions that avoid mass consolidations (the majority of states in this country), there is no significant backlog of asbestos cases. However, in jurisdictions that embrace large-scale consolidations, and in particular, in those that consolidate claims of minimal impairment with those of truly sick plaintiffs (e.g., West Virginia, Maryland), plaintiffs' lawyers file thousand of cases on behalf of minimally impaired claimants because those cases have value when lumped together with claims for malignancies.

Moreover, the landscape of asbestos litigation has changed dramatically since the General Assembly first enacted Code § 8.01-374.1 in 1992. Many manufacturers and distributors of asbestos and asbestos-containing products are no longer in existence as a result of bankruptcies caused by the volume of litigation against them. As a result of these bankruptcies, "peripheral" defendants, such as premises owners who had asbestos on their premises and independent contractors and subcontractors who installed asbestos containing products, have become the focus of such litigation. These defendants, which were previously not pursued by plaintiffs, have become the only source of available funds for those suffering from asbestos-related diseases. Widespread mass consolidation of asbestos cases, although supported by plaintiffs and their attorneys as the

only means of obtaining recovery, will only hasten the bankruptcy of other defendants -- an undesirable result for all parties involved.

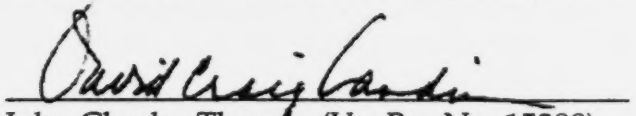
The interests of substantial justice demand that this Court issue a writ of mandamus to prevent this unprecedented trial from taking place.

## V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner now prays the Supreme Court of Virginia to exercise its discretion in issuing a writ of mandamus compelling the Circuit Court of Newport News to vacate its Orders of June 20, 2000 and June 7, 2001, and compelling it to abide by the requirements of Code § 8.01-374.1 and the Virginia and United States Constitutions.

Respectfully submitted this 20th day of February, 2002.

**PETITIONER HOPEMAN BROTHERS, INC.**



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**CERTIFICATE OF COMPLIANCE WITH CODE § 8.01-644**

I certify that on February 20, 2002 I have served a copy of the foregoing Petition for Writ of Mandamus on Respondent a reasonable time before filing with the Court. A true and correct copy of the Original Return of Service is attached at Tab 30 to the Appendix hereto.

David Craig Gardiner

**CERTIFICATE OF COMPLIANCE WITH CODE § 8.01-644**

The factual and legal statements contained herein are true and correct to the best of my knowledge and belief.

David Craig Gardiner

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS**

**IN RE: ALL ASBESTOS CASES:**

**At Law No: CL99-20000-00**

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**DEFENDANT HOPEMAN BROTHERS' OBJECTION TO PLAINTIFFS' PROPOSED ORDER AND MOTION TO RECONSIDER ORDER CONSOLIDATING ALL ASBESTOS CASES**

Defendant Hopeman Brothers, Inc. ("Hopeman Brothers"), by counsel, hereby objects to Plaintiffs' Proposed Order setting forth the cases to be included in the City of Newport News consolidated liability trial of asbestos cases to begin on February 27, 2002. In addition, Hopeman Brothers moves the Court to reconsider its Memorandum Order of July 20, 2000, consolidating 1297 of the approximately 1335 asbestos cases pending before it, and its Memorandum Order of June 7, 2001, setting forth the issues to be determined in the liability phase of the bifurcated trial. In support thereof, Hopeman Brothers adopts and incorporates by reference all objections to the June 20, 2000 Order and June 7, 2001 Order filed previously on behalf of individual defendants,[1] and further states as follows:

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[1] *See* Defendant Porter Hayden Company's Brief in Support of its Objection to Praecipe and Objection to Consolidation (attached hereto as Exhibit A); Defendant GAF Corporation's Memorandum in Opposition to Motion to Consolidate (attached hereto as Exhibit B); Defendant S. B. Decking's Motion to Sever Claims from Consolidated Trial or, in the Alternative, to Reconsider Trial Consolidation Plan (attached hereto as Exhibit C); Defendant Borg-Warner Security Corporation's Brief In Support of Its Objections to Proposed Court-Ordered Consolidation (attached hereto as Exhibit D).

## I. INTRODUCTION

This Objection and Motion is based on additional legal and factual support for arguments of record before this Court and provides additional reasons why this Court should not proceed with a consolidated trial.[2]

Specifically, the Court should not enter Plaintiffs' Proposed Order, and should reconsider and withdraw its previous Orders because: (1) Defendants' constitutional rights to due process and a fair trial will be violated by this consolidation; (2) this consolidation will not in fact result in efficiency for any of the parties involved or the Court; (3) the Court does not have the statutory authority to order this consolidation; (4) this consolidation and bifurcation will fatally prejudice Defendants; (5) the mass consolidation of nearly 1300 cases is an abuse of discretion, reversible error and merits the imposition of extraordinary relief; and (6) there are numerous other methods whereby the Court can manage its asbestos docket without violating Defendants' rights.

While the Court, in its Memorandum Order of July 20, 2000, stated that consolidation of all asbestos cases pending before it would adversely affect the rights of the parties to a fair trial, approximately 97 percent of the asbestos cases pending on its docket have nevertheless been consolidated in this matter. If this mass consolidation and bifurcated trial proceed on February 27, 2002, as proposed, Hopeman Brothers and all Defendants in this action will suffer imminent and immediate harm, which cannot be remedied by reversal on appeal or if a favorable result to Defendants is eventually reached Should the Court decide to proceed with this consolidated trial as ordered, Hopeman Brothers must seek immediate review from an appellate court.

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2 Hopeman Brothers does not, however, abandon or waive those arguments for purposes of appeal or seeking other relief.

Consequently, Hopeman Brothers requests that the Court rule on its Objection and Motion to Reconsider expeditiously, so that it has an opportunity to seek relief before it is forced to expend the extraordinary resources necessary to participate in this mass consolidated trial.

## II. ARGUMENT

### A. This Consolidation Violates Defendants' Constitutional Rights to a Fair Trial and Due Process of Law.

Although the Court relies on a Virginia statute in consolidating these cases, that statute cannot legally provide the Court with authority to violate Hopeman Brothers' or any defendant's constitutionally guaranteed rights. Federal law is clear - - a consolidation of this type and magnitude violates the United States Constitution.[3] Therefore, regardless of any purported authority provided by Virginia statutory or case law, this consolidation cannot stand.

Three factors generally set the parameters for determining the propriety and constitutionality of a given consolidation. First, the cases to be consolidated must share common questions. Second, the cases to be consolidated must not be so numerous so as to become "unmanageable." Finally, the consolidation must result in convenience and efficiency for the parties and the Court. In ordering this consolidation, the Court has not considered or made findings as to any of these factors.

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[3] As argued in the objections filed by other individual defendants and for the same reasons set forth herein, this consolidation also violates the Virginia Constitution's due process clause. *See* Va. Const. art. 1, § 11.

**1. These Cases Lack the Commonality Necessary to Order Consolidation.**

The consolidation of cases that are not sufficiently related or "common" violates a party's rights to due process, a fair trial, and other constitutional rights. *See, e.g., Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc); *In re Japanes Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084-1088 (3d Cir. 1980); *Satcher v. Commonwealth*, 244 Va. 220, 269 , 421 S.E.2d 821, 850-851 (1992) (Hassell, J., dissenting), *aff'd in part and rev'd in part* (on other grounds), *Satcher v. Pruett*, 126 F.3d 561 (4th Cir. 1997). Several courts have specifically held that consolidations of asbestos cases violated defendants' constitutional rights because the cases lacked the commonality necessary to order consolidation. *See, e.g., Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) (holding that consolidation of 600 asbestos cases, resulting in jury trial of 48 cases at a time, violated defendants' Seventh Amendment rights); *In re Fibreboard Corp.*, 893 F.2d 706, 709-12 (5th Cir. 1990) (discussing arguments that consolidation of 3,000 asbestos cases would violate defendants' Fourteenth Amendment due process rights and Seventh Amendment right to a fair trial, in holding that consolidation was improper); *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) (holding that consolidation of 13 asbestos cases violated defendants' constitutional right to a fair trial).

The United States Supreme Court specifically addressed the lack of commonality among asbestos cases in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). In that case, the Court upheld the Third Circuit's decision to vacate a Federal Rule of Civil Procedure 23 class action certification of a nationwide settlement class of all current and future asbestos-related claims because plaintiffs' claims were not sufficiently common. *Id.* at 597. The Court noted that the only thing common about the proposed class of plaintiffs'

claims was that each plaintiff alleged adverse effects from "past exposure to asbestos products manufactured by one or more of 20 companies." *Id.* The Court held that this characteristic alone was not enough to establish the predominance of common issues necessary to certify a Rule 23 class. Rather, the Court held that commonality did not exist because:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

*Id.* at 624 (quoting the Third Circuit's opinion in the same case). As such, the Supreme

Court would not certify the class.

To ensure that constitutional rights are protected, courts have set forth seven criteria to determine whether there is sufficient commonality to consolidate asbestos cases. *See, e.g., Johnson v. Celotex Corporation*, 899 F.2d 1281 (2d Cir. 1990); *Malcolm*, 995 F.2d at 354; *In re: All Asbestos Cases Pending in the United States District Court for the District of Maryland* (D. Md. Dec. 6, 1983) (en banc) (unreported); *see also In re Repetitive Stress Injury Litig.* 11 F.3d 368, 374 (2nd Cir. 1993) (non-asbestos case citing these seven criteria). These criteria include: (1) common worksites; (2) similar occupations; (3) similar duration and time period of exposure; (4) same disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; and (7) whether all plaintiffs are represented by the same counsel.

*Id.* at 1285. The first five criteria are the most important because they determine commonality, while the last two criteria are less important because they address only convenience. *In re Repetitive Stress Injury Litig.*, 11 F.3d at 374. If these criteria are not met and commonality is not established, a proposed consolidation will violate a defendant's constitutional rights to a fair trial and due process. *See id.*

The Court did not address any of these criteria in ordering this consolidation, and, in fact, six of these seven criteria are not met in this consolidation.[4] Similar to the plaintiffs in Amchem, the only thing "common" about these cases is that plaintiffs allege that asbestos caused them injury and they have all been filed in Newport News. Although the majority of the plaintiffs in this matter allege exposure at Newport News Shipyard and Dry Dock Company ("the Shipyard"), many allege exposure at dozens of other sites in addition to the Shipyard. Indeed, several plaintiffs never worked at the Shipyard. The plaintiffs worked in dozens of different occupations (from security guards to welders and insulators), some directly with asbestos-containing products and others were simply by-standers. The plaintiffs worked during markedly different time periods (ranging from the 1930s to the 1990s), and for various exposure periods (ranging from as little as three months to more than five decades). The plaintiffs, some living and some dead, allege a variety of different diseases, including mesothelioma, lung cancer, colon cancer, asbestosis, and pleural plaque disease.

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[4] The only criterion that is met in this consolidation is that Plaintiffs are represented by the same counsel. In fact, to this point there has been no clear determination as to what cases are to be included in this proposed consolidation.

Plaintiffs have not presented the Court with any evidence from which it could make findings as to these criteria and the Court's Orders are devoid of any findings that would suggest it had considered these criteria. The one finding that the Court did make -- that "consolidation of the cases would adversely affect the rights of the parties to a fair trial" and, thus, any consolidation will "be by categories" -- was directly contrary to its present actions. The Court has now outright rejected the use of categories for the liability phase of this trial. [5] While the Court may still contemplate smaller consolidations by some as yet undefined common categories for the damages phase of the trial,[6] these categories are just as important in the liability phase because liability cannot legally be established under Virginia law without considering a plaintiffs' occupation, employer, type of exposure, exposure period, exposure history and disease.

For example, the duty owed by a manufacturer or supplier cannot be determined without knowing the employer of a given plaintiff. Under Virginia law, there is no duty on product suppliers to warn employees of knowledgeable industrial purchasers of product-related hazards. See Goodbar v. Whitehead Brothers, 591 F. Supp. 552 (W.D. Va. 1984) (applying Virginia law). Furthermore, because foreseeability is a central factor in determining the duty owed by a manufacturer or distributor of products, liability will further depend on the occupation of any given plaintiff, the duration of his exposure and the nature of his contact with asbestos-containing products (i.e., whether he worked directly with the product, was a bystander, or was a household member of a worker who allegedly brought

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[5] *See* Transcript of Proceedings Before the Honorable Robert W. Curran, dated July 27, 2000, at 26-27 (cited portions attached hereto as Exhibit E).

[6] The Court has failed to provide any definitive explanation of how it plans to proceed with the second phase of the consolidated trial.

asbestos home on his or her clothing). To exclude all of these factors from the liability phase, is to impermissibly determine liability in a vacuum.

**2. The Number of Cases Consolidated Violates Constitutional Limitations.**

In addition to the lack of commonality, the sheer number of cases precludes this consolidation. The consolidation of 1297 cases is significantly higher than cases found by other courts to violate defendants' constitutional rights. Courts contemplating consolidation must "take into account the number of cases affected." See Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993). In Baker v. Waterman Steamship Corp., 11 F.R.D. 440 (S.D.N.Y. 1951), the court held that the consolidation of only two cases was inappropriate where one plaintiff was more severely injured than the other. In Cain, the Southern District of Alabama specifically criticized the "Try-as-many-as-you-can-at-one-time approach" and granted defendants' motions for new trial after a consolidated trial of only thirteen asbestos personal injury cases. See Cain, 785 F. Supp. at 1456. In doing so, the Court noted that the number of cases consolidated and the resulting amount of evidence to be considered by the jury prejudiced the defendants and made the consolidation at issue unworkable. See id. In In re Repetitive Stress Injury Litigation, 11 F.3d 368 (2d Cir. 1993), the court held that the consolidation of 44 cases would violate the parties' right to a fair trial.

In those cases where courts have upheld consolidations, the number of cases consolidated has been extremely low. See Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990) (consolidation of two cases upheld); Hendrix v. Raybestos-Manhattan, Inc. et al., 776 F2d 1492 (11th Cir. 1985) (eleven cases). Even this Court limited the consolidation of asbestos cases to two to four cases before the enactment of Virginia

Code § 8.01-374.1.[7] While § 8.01-374.1 certainly codifies and, therefore, clarifies the Court's authority to consolidate, it does not and cannot provide the authority to do so at the expense of Defendants' constitutional rights. Consequently, this Court has exceeded its authority in ordering this consolidation.

### 3. This Consolidation Will Be Unworkable and Inefficient.

The Plaintiffs' motivation for seeking this consolidation -- concerns of convenience and efficiency -- are secondary and must yield to the paramount concern of protecting the parties' constitutional rights and avoiding unfair prejudice. *See Lewis v. ACB Bus. Servs. Inc.*, 135 F.3d 389, 412-13; *Malcolm*, 995 F.2d at 350. Nevertheless, consolidation is never appropriate unless it is found to serve the convenience of the parties and their witnesses, and further the just and efficient conduct of the litigation. *See, e.g., E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998); *In re Eli Lilly & Co. V. Oraflex Prods. Liab. Litig.*, 578 F. Supp. 422, 423 (J.P.M.L. 1984). But this consolidation will not result in convenience, economy or efficiency for any of the parties involved or the Court.

Mass consolidations inevitably result in a period of years where not a single case is tried. *See* Thomas E. Willging, *Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 334 (1999) (citing the experience of the courts in *Cimino v. Raymark Industries*, 749 F. Supp. 649, 650 (E.D. Tex. 1990), rev'd , 151 F.3d 297 (5th Cir. 1998) and *Amchem Prods., Inc. v. Windsor*, 117 S. Ct.

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[7] *See* Letter from Judge Robert W. Curran to Jonathan A. Smith-George, Esq., et al., dated December 11, 1991 (attached hereto as Exhibit F). Even in consolidations with only two plaintiffs, this Court noted that it would not consolidate cases in which one plaintiff was living and one was dead. Other Virginia Courts have held similarly. *See Amax Concrete Corp. v. Isom*, 1990 WL 751061 (Va. Cir. Ct. 1990).

2231 (1997)). In fact, the last year and a half has been spent litigating the propriety of the proposed consolidation rather than the merits of any single plaintiff's case. In that time, the mechanics of how the consolidated trial will proceed have not been resolved. If and when a trial does finally occur, the trial will be lengthy and inefficient due to the volume of evidence necessary to establish liability against approximately 25 defendants. Furthermore, the vast majority of mass consolidations are reversed on appeal or new trials are ordered.[8] In the end, the consolidation burdens the court, wastes resources and causes greater delays than individual trials.

The Circuit Court for the City of Baltimore's experience with mass asbestos consolidation in *Abate, et al. v. ACand S, Inc., et al.*[9] is illustrative of the complete failure of mass consolidations to result in any actual efficiency or convenience. The *Abate* consolidation involved more than 8,500 plaintiffs and 15 defendants. Cross-claims and third-party claims were severed from the first trial and tried in a separate consolidated trial. It took over five years from the date of consolidation, and at least one failed trial, until completion of only the "common issues" portion of the trials. It was almost another five years, after various post-trial motions and appeals, until the first "second phase" trial began. The second phase trials are still ongoing today. In the approximately ten years since the *Abate* proceedings began, several of the defendants have gone bankrupt and many of the plaintiffs have died. Significantly, even with more than 10,000 asbestos cases now pending on its docket, the Circuit Court for the City of Baltimore has not considered or ordered another mass consolidation of asbestos cases.

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8 *See* Section C, *infra*.

9 Cause Nos. 89236704 and 93076701.

**B. The Court Does Not Have the Authority to Order This Consolidation.**

In addition to the constitutional bars to this consolidation, the statute the Court relies on to consolidate these nearly 1300 cases does not provide it with the authority to do so. Rather, it places two significant limitations on the Court's authority to consolidate. First, Virginia Code § 8.01-374.1 applies only to civil actions "against *manufacturers or suppliers* [products liability] of asbestos or products for industrial use that contain asbestos." *See* Va. Code § 8.01-374.1(A) (emphasis added). Second, § 8.01-374.1 expressly prohibits consolidation if it will "adversely affect the rights of the parties to a fair trial." *See* Va. Code § 8.01-374.1(A) (emphasis added). These two limitations preclude the Court from ordering the consolidation of these nearly 1300 cases.

**1. The Court Does Not Have the Authority to Consolidate Products Liability Cases With Non-Products Liability Cases Under Virginia Code § 8.01- 374.1.**

Many of the defendants in this consolidation are not manufacturers or suppliers of asbestos-containing products. The plain language of § 8.01-374.1 states that it *"shall not apply to any party defendant unless that defendant was a manufacturer of, or supplier of, asbestos or products for industrial use that contain asbestos, at any of the times alleged in the motion for judgment."* Va. Code § 8.01-374.1(D) (emphasis added). When the language of a statute is clear and unambiguous, "there is no need for construction by the court; the plain meaning and intent of the enactment will be given it." *See Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1984). If the words are clear, a court must "take the words as written" and give them their plain meaning. *See Ervin B. Davis & Co. v. Department of Crim. Justice Servs.*, 49 Va. Cir.

447, 1999 Va. Cir. LEXIS 365 (citing *Brown*, 229 Va. at 321, 330 S.E.2d at 87).[10] Thus, the plain language of § 8.01-374.1 controls.

By its plain language, § 8.01-374.1 only applies to products liability actions.[11] It does not apply to civil actions against premises owners for exposure to asbestos on their property, to claims against independent contractors or subcontractors who used or installed asbestos-containing products, or to indemnity or third-party claims. *See id.* Like its federal counterpart, Federal Rule of Civil Procedure 42, the central premise of § 8.01-374.1 is that consolidation should only be ordered for cases with common issues.[12] *See Brewer v. Republic Steel Corp.*, 513 F.2d 1222 (6th Cir. 1975); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459 (E.D. Mich. 1985).

Virginia law has different standards for establishing liability against a premises owner for a dangerous condition on his property versus a manufacturer or distributor of a defective or dangerous product. A premises owner has a duty to use ordinary care to keep his premises "reasonably safe" for those who enter with his knowledge and permission, including employees of independent contractors

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10 This is especially true here, where although § 8.01-374.1 of the Code of Virginia was enacted in 1992, no published case has interpreted, discussed or even cited that statute.

11 Robert Hatten, an attorney representing plaintiffs in many asbestos cases pending in the City of Newport News, was primarily responsible for the passage of Va. Code § 8.01-374.1. *See* Letter from Robert R. Hatten to Senator Bobby C. Scott, dated November 20, 1991 (attached hereto as Exhibit G). Even his proposed language for the statute limited its scope specifically to "asbestos products liability actions." *See* Proposed New Statute For Special Rules Concerning Asbestos Products Liability Actions (attached hereto as Exhibit H).

12 The legislative history of Virginia Code § 8.01-374.1 suggests that it was "closely modeled" after Federal Rule of Civil Procedure 42. *See* Legislative Summary of Va. Code § 8.01-374.1 (attached hereto as Exhibit I).

working on his premises. *See Franconia Assocs. v. Clark*, 250 Va. 444, 463 S.E.2d 670 (1995); *Davis Bakery, Inc. v. Dozier*, 139 Va. 628, 124 S.E.2d 411 (1924). In a premises liability suit, the plaintiff must show that the property owner had actual or constructive knowledge of a defective condition on his premises to establish a prima facie case of negligence. *See Roll ' R' Way Rinks, Inc. v. Smith*, 218 Va. 321, 327 (1977).

In a products liability action, however, the knowledge of the manufacturer or distributor that the product might be defective or dangerous is only at issue in a "failure to warn" case. In a design defect or manufacturing defect case, the plaintiff must only show that the goods were unreasonably dangerous for their ordinary or foreseeable uses, and that the unreasonably dangerous condition existed when the goods left the defendant's hands. *See Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428 (1975). In a failure to warn case, the plaintiff must show that the manufacturer or distributor had "reason to know" that the product was dangerous, had no reason to believe that users would realize its dangerous condition, and failed to exercise reasonable care in warning them of the danger.[13] *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 413 S.E.2d 630 (1992); *Featherall v. Firestone Tire and Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (Va. 1979).

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13 The evidence necessary to establish liability under a failure to warn theory will also differ depending on whether the defendant is a manufacturer or a distributor. A manufacturer has more "reason to know" that a product it manufacturers is dangerous than a distributor of the same product. This is especially true if the failure to warn begins with the manufacturer. A distributor or supplier has no independent duty to inspect or test a product. *See* Brief of Porter Hayden Company in Support of Objection to Praecipe and Objection to Consolidation, at 10-14 (citing *Featherall v. Firestone*, 219 Va. at 962 and 62 Am. Jur. 2d *Products Liability* Section 332 (1984)).

Finally, independent contractors and subcontractors have a less stringent duty to warn of the potential hazards of products with which they work than do manufacturers, suppliers or premises owners. *See ACandS, Inc. v. Abate*, 710 A.2d 944 (1998). Additionally, in cases involving independent contractors other issues exist. For example, if the plaintiff is an employee of another independent contractor his claims may be limited to Workers' Compensation benefits. *See* Va. Code § 65.2-307;' *Smith v. Horn*, 232 Va. 302, 351 S.E.2d 14 (1986); *Henderson v. Central Telephone Co.*, 233 Va. 377 (1987). Furthermore, independent contractors may have defenses unavailable to premises owners or manufacturers and suppliers, such as a "government contractor" defense. *See generally Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

The rationale for limiting consolidations under § 8.01-374.1 to one theory of liability -- products liability -- is obvious. A consolidation with several different theories of liability requires the jury to apply different rules of law to each class of defendants. Consequently, the commonality that would make consolidation appropriate and constitutionally sound is not present. Section 8.01-374.1, therefore, cannot be used to consolidate all asbestos cases pending in the City of Newport News.

Several of the defendants in the nearly 1300 cases that the Court has consolidated are not manufacturers, distributors or suppliers of asbestos-containing products. For example, in its Motion to Sever Claims from Consolidated Trial, or in the Alternative, to Reconsider Trial Consolidation Plans, Defendant S.B. Decking, Inc. asserts that it was not a manufacturer or distributor of asbestos-containing products.[14] Rather, it was a contractor that

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[14] *See* Defendant S.B. Decking, Inc.'s Motion to Sever Claims from Consolidated Trial, or in the Alternative, to Reconsider Trial Consolidation Plans, dated July 27, 2000.

installed asbestos-containing products.[15] Similarly, Defendant ACandS, Inc. was a contractor that allegedly installed asbestos-containing products -- not a manufacturer, distributor or supplier. The claims against these defendants are based on theories of liability other than products liability. Therefore, the Court does not have the authority to order the consolidation of these cases under § 8.01-374.1.[16]

**2. This Consolidation Will Prejudice Defendants and Adversely Affect Their Right to a Fair Trial.**

Moreover, as an overriding mandate, § 8.01-374.1 prohibits consolidation if it would "adversely affect the rights of the parties to a fair trial." This Court has already been presented with substantial legal and factual evidence that Defendants' rights to a fair trial will be prejudiced by

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15 *See id.*

16 Only *asbestos* products liability cases have been singled out for differential treatment by the Virginia legislature. Any other consolidation and any consolidation of asbestos cases involving non-products liability defendants must be pursuant to Virginia's general consolidation statute -- the Virginia Multiple Claimant Litigation Act (Virginia Code § 8.01-267.1 *et seq.*). That statute was enacted in 1995 and provides in relevant part that "On motion of any party, a circuit court may enter an order joining, coordinating, consolidating or transferring civil action," if it finds the following: (1) separate civil actions brought by six or more plaintiffs involving common questions of law or fact and arising out of the same transaction or occurrence; (2) the common questions of law or fact predominate and are significant to the action; and (3) the order will promote the ends of justice and efficiency without violating each party's right to due process or prejudice each party's right to a fair and impartial resolution. *See* Va. Code § 8.01-267.1(1)-(3). Like § 8.01-374.1 and Federal Rule of Civil Procedure 42, this statute has an express commonality requirement. Additionally, orders of a circuit court consolidating claims for trial under the Virginia Multiple Claimant Litigation Act are appealable directly to the Supreme Court of Virginia on an interlocutory basis. *See* Va. Code § 8.01-267.8(1).

this consolidation. Further evidence from scientific studies and the experience of other courts that have attempted mass consolidations shows that juries cannot possibly sort out and keep track of the different parties, claims, evidence, and legal theories in a consolidated action of this magnitude. The result is a real and quantifiable prejudice to defendants. The Court's proposed bifurcation will only compound this prejudice.

Empirical studies establish that consolidation substantially prejudices defendants. For example, studies show that:

- In consolidated trials, juries are unable to distinguish the injuries of the most severely injured plaintiffs from those who are virtually unscathed.[17]

- The cumulative effect of consolidation is to significantly raise the average damage amount awarded to plaintiffs.[18]

- As the population of known plaintiffs increases in consolidated proceedings, juries are more likely to blame the defendants for injuries.[19]

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17 *See* Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 Law & Psychol. Rev. 43 (1998) (relying on statistical analysis of the actual jury verdicts in *Cimino v. Raymark Industries, Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990) and their own simulated consolidated trials).

18 *Id.* at 59.

19 *Id.*

- Consolidation alters the patterns of verdicts and awards handed down by juries. Although these changes are potentially relevant for both sides, they are generally more favorable to plaintiffs and more prejudicial to defendants.[20]

- Even in traditional "two litigant" toxic tort cases, "juries are unable to comprehend the principle that exposure to a toxic chemical dosage of one part-per-billion produces a different biological effect than exposure to the ame chemical at one part-per-million." Studies show that juries believe that "a poison, is a poison, is a poison."[21]

- Even in single party litigation, juror comprehension of jury instructions is extremely low.[22]

The experience of trial courts that have attempted mass consolidations supports the findings of social scientists. Juries consistently award higher total compensatory and punitive damages in consolidated cases. *See, e.g., Cain v. Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992). In *Cain*, a consolidated trial of thirteen asbestos cases, the jury awarded compensatory damages that were nearly 10 times higher than the average award for other asbestos cases in the same district. *Id.* at 1454. In granting the defendants' motions for a new trial, the court held that the "compensatory damages awarded . . . not only shock the

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20 *Id.* at 66.

21 *See* Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 Judicature 292 (1989) (citing scientific studies of juror comprehension). The phenomenon cited would be exponentially multiplied where as here, there are 1297 plaintiffs who were allegedly exposed to such a "poison."

22 *See* Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77, 84-87 (1988) (citing their own studies and numerous other studies and experiments).

judicial conscience but also persuade the court that the jury verdicts were prejudiced by the joinder of all these actions." *Id.* at 1451-52. The *Cain* court further noted that the jury was unable to differentiate between those plaintiffs that were suffering from serious illness and those that were not -- the jury simply awarded all plaintiffs the same amount of damages no matter what their injury. *Id.* at 1455.

Juries also have difficulty assigning fault among the numerous named defendants in consolidated actions. It appears that they simply adjudge each one culpable and apportion liability equally. *See, e.g., Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993). In *Malcolm*, a consolidated trial of 48 asbestos cases, the jury equally apportioned nine percent liability to all defendants despite strong evidence against some defendants and little evidence against others. *See id.* at 352. As the *Malcolm* court observed, the equal apportionment of liability in the face of such a complex case, "amounted to the jury throwing up its hands in the face of a torrent of evidence." *Id.*

The prejudice to Hopeman Brothers and all Defendants from this consolidation will only be compounded by the Court's proposed bifurcation. Studies show that:

- Separation of trial issues through bifurcation alters the outcome of trials because juries are unable to establish "narratives" that allow them to sort evidence in complex cases.[23]

- Bifurcated trials result in higher damages awards to plaintiffs than traditional single plaintiff trials.[24]

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[23] *See* Irwin A. Horowitz & Kenneth S. Bordens, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989).

[24] *See id.* at 26.

- In bifurcated trials where juries try the issue of liability before causation, more pro-plaintiff verdicts are reached than if causation is tried first.[25]

By disallowing all evidence of individual causation, including disease processes, exposure history and duration, and occupation, from the liability phase of the trial, the jury must in effect determine liability in a vacuum.

**C. This Consolidation Constitutes a Reversible Abuse of the Court's Discretion, and Merits the Imposition of Extraordinary Relief.**

If the Court proceeds with this consolidation, it will be an abuse of the Court's discretion. If the consolidation is not abandoned before the consolidated trial is scheduled to begin in February 27, 2002, it will result in imminent harm to Defendants and inevitably be reversed on appeal.

As a result of prejudice to defendants and violations of constitutional rights, appellate courts have often reversed consolidations on appeal or ordered new trials. See Malcolm, 995 F.2d 346 (reversed and remanded); Cain, 785 F. Supp. at 145 (ordering new trial after verdict); Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976) (ordering new trial). In all of these cases, there were substantially fewer parties and fewer issues involved than are present here. See id. Moreover, ordering a consolidation that violates parties' constitutional rights is sufficiently egregious conduct that appellate courts have routinely granted extraordinary relief to prevent such consolidations from proceeding. See, e.g., In re Repetitive Stress Injury Litigation, 11 F.3d 368, 372 (2d Cir. 1993) (writ of mandamus granted ordering trial court to vacate proposed consolidation of 44 cases for trial); In re

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25 *See id.* at 26. The scientific rationale for this result is that once a jury renders a difficult decision against a defendant, subsequent anti-defendant decisions are more easily made.

Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (writ of mandamus granted because proposed plan for second phase of trial was outside court's authority).

The granting of a writ of mandamus or a writ of prohibition is generally an "extraordinary" remedy. See Goldman v. Landisle, 552 S.E.2d 67, 70-71 (Va. 2001);[26] Lawrence v. Jenkins, 258 Va. 598, 521 S.E.2d 523 (1999). It is appropriate where necessary "to confine an inferior court to a lawful exercise of its prescribed authority." See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983). Virginia law on mandamus does not differ substantially from that of other jurisdictions, including federal courts: "Where the right involved and the duty sought to be enforced are clear and certain and where there is no other available specific and adequate remedy," the Virginia Supreme Court will issue a writ of mandamus. See Goldman, 552 S.E.2d at 71; Lawrence, 258 Va. at 602, 521 S.E.2d at 525; Richmond-Greyhound Lines, Inc. v. State Highway Commissioner, 200 Va. 147, 151-52, 104 S.E.2d 813, 816 (1958). Thus, mandamus is appropriate if three conditions are met: (1) there is a clear right to the relief sought by the party seeking it; (2) the party sought be compelled has a legal duty to the thing which is sought to be compelled; and (3) the absence of another adequate remedy to prevent harm to the party seeking mandamus. See id.

This consolidation, like others, presents exactly the situation where mandamus is appropriate. Hopeman Brothers, like all defendants, has undisputed rights to a fair trial and due process under both the United States Constitution and the Virginia Constitution and this Court has a duty, both as a general matter and under the specific language of § 8.01-374.1 to protect those constitutional rights. Furthermore, this Court lacks the authority to order

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26 Because this case was decided September 14, 2001, no Virginia Reporter citation references are currently available.

this consolidation under the plain language of § 8.01-374.1. If this consolidation were to proceed as ordered, Defendants, including Hopeman Brothers, would suffer immediate and imminent harm because their constitutional rights will be violated. Moreover, if this Court does not reconsider and withdraw its Orders, Hopeman Brothers has no other adequate remedy to prevent the harm that it would suffer. The statutory language of § 8.01-374.1 specifically provides that any order to consolidate or bifurcate under that statute is "interlocutory" for purposes of appeal.[27] Thus, Hopeman Brothers would potentially be forced to appear in a massive trial that will likely take months to try to completion, spend substantial money in its defense, and wait years before the violation of its constitutional rights can even be addressed, only then to have an opportunity to re-try the cases in a process that adequately protects its rights.

**D. There Are Other Case Management Devices that This Court Can Use to Manage its Asbestos Docket In a Legal, Fair, Efficient and Expeditious Manner.**

Some form of case management may be necessary and desirable to deal with the numerous asbestos cases pending in the City of Newport News. Aside from the constitutional and fairness concerns that mass consolidations raise, experience has shown that mass consolidations are not effective at efficiently resolving litigation. There are other methods of docket management available to the Court that have proven to be substantially more effective than consolidated trials, while protecting the rights of the litigants involved.

Mass consolidated trials of asbestos cases are rare. Most jurisdictions, including many with substantially more asbestos cases pending on their dockets than the City of

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[27] The legislature, however, cannot foreclose a defendant's right to immediately appeal a clear violation of its constitutional rights.

Newport News, have wisely refused to attempt mass consolidation. For example, the City of New York, which has well over 10,000 cases pending on its docket, will try no more than nine asbestos cases at a time. Additionally, in Dallas County, Texas, where thousands of asbestos cases are pending, the courts still try asbestos cases on an individual basis.

Courts in other jurisdictions have recognized that while mass consolidation is not the answer, some form of case management is necessary to resolve the multitude of asbestos cases pending on their dockets. Those jurisdictions employ various other case management devices to manage their asbestos dockets in a fair, efficient and expeditious manner. One such method is to consolidate solely for discovery and pretrial matters, and then conduct individual trials.

The federal courts have long used Multidistrict Litigation to coordinate and consolidate pretrial discovery proceedings in asbestos cases. *See In re Asbestos Personal Injury Products Litigation,* 771 F. Supp. 415 (J.P.M.L. 1991), *aff'd without op., sub non, Prekler v. Owens-Corning Fiberglas Corp.*, 60 F.3d 824 (4th Cir. 1995). Asbestos personal injury and wrongful death cases pending in federal court are transferred to Judge Weiner in the United States District Court for the Eastern District of Pennsylvania for consolidated and coordinated discovery and pretrial matters. Once discovery is complete, the cases are remanded to the federal district court in which they were filed for an individual trial.

Other jurisdictions, such as the City of New York, use magistrate judges or "special masters" to assist in presiding over pretrial matters in asbestos cases. This system reduces the burden on the Court and allows the parties greater access to a neutral arbiter to resolve their pretrial disputes.

Such a system of case management is feasible in the City of Newport News because the Code of Virginia specifically authorizes the Chief Justice of the Virginia Supreme Court, upon his own initiative or upon application by a trial court judge, to designate other judges or retired judges to assist in courts with "congested" dockets. *See* Va. Code §§ 17.1-105.[28] A judge so appointed has "the same powers and jurisdiction" and is "authorized to perform the same duties as the judge whom he is designated to assist" and may be used to hear a "specific case or cases." *See* Va. Code § 17.1-105. Thus, such a judge could not only conduct hearings on pretrial matters, but could conceivably preside over the trial of asbestos cases.

Many jurisdictions, including New York City, Bridgeport, Connecticut and New Jersey, have systems of prioritizing the asbestos cases pending on their dockets so that those plaintiffs who are in the most dire situation have their claims heard first, as opposed to the general "first filed" system. These "extremis dockets" ensure that the cases that need to be resolved in an expeditious manner are resolved first.

Finally, other courts in Illinois, Massachusetts, and the United States District Court for the Eastern District of Pennsylvania in the MDL MARDOC litigation, have established "inactive dockets" or "pleural registries" to deal with the asbestos cases pending on their dockets. Upon filing of a suit or an administrative docketing of a potential claim, these courts place asbestos cases on an "inactive" status until plaintiffs produce certain evidence supporting their claims, including proof of an asbestos-related personal injury and probative evidence of exposure to products connected to each defendant. The statute of limitations is tolled while plaintiffs' cases are on an "inactive" status.

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[28] Virginia Code § 17.1-106 specifically authorizes the recall of retired judges.

Once plaintiffs produce the required information, their cases are moved to "active" status where they may proceed. Such a system ensures that only cases that are ripe and ready to proceed are on the court's active docket, and eliminates the court's need to sort out the actionable claims of the most deserving plaintiffs from the backlog of asbestos cases pending on their dockets.

Thus, while Hopeman Brothers recognizes that some form of case management may be appropriate to deal with the asbestos cases pending in the City of Newport News, mass consolidation is not the appropriate tool. Any case management device must be designed to limit the prejudice to Defendants and protect their constitutional rights. By carefully examining the procedural devices used by other jurisdictions and consulting with counsel, the Court can achieve its objective of resolving the asbestos cases pending on its docket in an efficient manner, without unduly prejudicing the Defendants or violating constitutional rights.

## IV. CONCLUSION

For the foregoing reasons, and for the reasons set forth more fully in the various other objections filed by individual defendants, Defendant Hopeman Brothers, Inc. respectfully requests that the Court refuse to enter Plaintiffs' Proposed Order, and reconsider and withdraw its June 20, 2000 and June 7, 2001 Memorandum Orders.

Hopeman Brothers respectfully requests an oral hearing on its Objection and Motion to Reconsider on December 11, 2001, or at such earlier time as the Court may designate.

Respectfully submitted this 30th day of November, 2001.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day of November, 2001, a true and correct copy of the foregoing instrument was served upon all known counsel of record via first class U.S. mail, at the addresses listed below:

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By: \s\Gerard E. W. Voyer

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**IN RE: ALL ASBESTOS CASES**

**AT LAW NO. CL99-20000-00**

**NOTICE OF PRESENTATION**

PLEASE TAKE NOTICE that, pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the annexed Order will be presented to the Court for entry on December 11, 2002 at 2:00 p.m. Any counsel objecting to the entry of this order must assert their objections on or before November 30, 2001.

ALL ASBESTOS CASES

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I certify on the 14th day of November, 2001, I mailed a copy of the foregoing Notice for Presentation to:

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\s\ Kevin P. Bilms

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**IN RE: ALL ASBESTOS CASES**

**AT LAW NO. CL99-20000-00**

**ORDER**

THIS COURT, having entered a consolidated trial of liability issues in all asbestos personal injury cases pending before this Court in which plaintiff alleges exposure to asbestos-containing products during the course of their employment at Newport News Shipping and Dry Dock Company and where plaintiff is represented by the Law Offices of Peter T. Nicholl, and having ordered that said consolidation would include the cases of all plaintiffs filed on or before January 31, 2001, against all defendants served with process before January 31, 2001, it is hereby

ORDERED, that the consolidated liability trial, which will commence before this Court on February 27, 2002, shall include plaintiffs' claims in those Abbreviated Motions for Judgment listed in Exhibit 1, annexed hereto and incorporated herein. The consolidated liability trial will include plaintiffs' claims against all defendants who were served with process on or before January 23, 2001.

The parties continuing objections to the consolidated liability trial for the reasons previously stated are noted.

All counsel of record have been given notice of presentation of this Order, and have been given the opportunity to assert any objections to its entry, pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia. As no objections have been noted, and for good cause shown, in accordance with the provisions of Rule 1:13 of

the Rules of the Supreme Court of Virginia, the court hereby dispenses with the endorsement of all counsel of record.

Enter _____

_____

Judge

**§ 8.01-374.1. Consolidation or bifurcation of issues or claims in certain cases; appeal.**

A. In any circuit court in which there are pending more than forty civil actions against manufacturers or suppliers of asbestos or products for industrial use that contain asbestos in which recovery is sought for personal injury or wrongful death alleged to have been caused by exposure to asbestos or products for industrial use that contain asbestos, the court may order a joint hearing or trial by jury of any or all common questions of law or fact which are at issue in those actions. The court may order any or all the actions consolidated, unless the court finds consolidation would adversely affect the rights of the parties to a fair trial. The court may submit special interrogatories to the jury to resolve specific issues of fact, and may make such orders concerning proceedings therein consistent with the right of each of the parties to a fair trial as may be appropriate to avoid unnecessary costs, duplicative litigation or delay.

B. To further convenience or avoid prejudice in such consolidated hearings, when separate or bifurcated trials will be conducive to judicial economy, the court may order a separate or bifurcated trial of any claim, or any number of claims, cross-claims, counterclaims, third-party claims, or separate issues, always preserving the right of trial by jury. However, in any such bifurcated proceeding, the entitlement of an individual plaintiff to an award of punitive damages against any defendant shall not be determined unless compensatory damages have been awarded to that individual.

C. Any order entered pursuant to this section shall, for purposes of appeal, be an interlocutory order. Any findings of the court or jury in any bifurcated trial shall not be appealable until a final order adjudicating all issues on a specific claim or consolidated group of claims has been entered.

D. This section shall not apply to actions arising under Article 6 (§ 8.01-57 et seq.) of Chapter 3 of this title or the Federal Employers Liability Act (45 U.S.C. § 51 et seq.). In addition, this section shall not apply to any party defendant unless that defendant was a manufacturer of, or a supplier of, asbestos or products for industrial use that contain asbestos, at any of the times alleged in the motion for judgment.

(1992, c. 615.)

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS**

**In re: All Asbestos Cases: At Law No. CL99-20000-00**

| | |
|---|---|
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| Daniel W. Adams<br>DOB: 8-9-14<br>239-12-9250 | At Law No. 29704-RW |
| James A. Adams<br>DOB: 1-3-30<br>246-40-4846 | At Law No. 29123-EH |
| Raheem Ahmad<br>DOB: 10-3-45<br>227-58-1823 | At Law No. 29365-VA |
| Reginald D. Aldridge<br>DOB: 12-18-37<br>245-60-6335 | At Law No. 28250-EH |
| Clarence Alexander<br>DOB: 3-25-35<br>248-54-5021 | At Law No. 28537-VC |
| Samuel Allbritton<br>DOB: 4-23-17<br>239-07-9302 | At Law No. 29032-VC |
| Carroll M. Allen<br>DOB: 10-28-50<br>244-82-7302 | At Law No. 29793-VC |
| Lee R. Alister<br>DOB: 5-4-35<br>239-48-9234 | At Law No. 27515-RW |

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| David R. Alston<br>DOB: 2-24-35<br>245-48-8988 | At Law No. 27676-RW |
| William B. Alston<br>DOB: 9-2-42<br>230-56-9773 | At Law No. 27766-VA |
| Willie M. Alston<br>DOB: 7-20-41<br>240-68-2757 | At Law No. 27790-EH |
| Clinton B. Anderson<br>DOB: 10-26-49<br>230-66-7033 | At Law No. 29560-RC |
| Frank Anderson, Sr.<br>DOB: 11-13-28<br>231-28-2325 | At Law No. 29570-RC |
| George M. Anderson, Jr.<br>DOB: 4-20-51<br>251-96-3410 | At Law No. 29317-EH |
| Ida L. Anderson<br>DOB: 8-13-39<br>049-30-9753 | At Law No. 29618-VA |
| James M. Anderson<br>DOB: 2-10-40<br>228-46-3741 | At Law No. 28225-EH |
| James P. Anderson<br>DOB: 1-17-37<br>224-44-4455 | At Law No. 29318-RC |
| Michael J. Anderson<br>DOB: 11-30-54<br>240-96-2833 | At Law No. 28198-RW |
| Richard Anderson<br>DOB: 5-31-34<br>420-40-9512 | At Law No. 27229-VA |
| Joseph E. Angle, Jr.<br>DOB: 7-6-31<br>234-46-0589 | At Law No. 29794-RW |

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| Darnell O. Anthony<br>DOB: 11-11-49<br>224-70-1465 | At Law No. 27466-RW |
| Larry A. Anthony<br>DOB: 9-2-52<br>228-74-4007 | At Law No. 22925-VC |
| Larry C. Anthony<br>DOB: 9-2-52<br>224-70-1043 | At Law No. 27660-VC |
| Stewart F. Archey<br>DOB: 5-27-32<br>317-30-0630 | At Law No. 29413-RC |
| Phil S. Armistead, Sr.<br>DOB: 6-25-47<br>226-60-7258 | At Law No. 29006-VC |
| Ronnie D. Armstead<br>DOB: 2-2-54<br>438-88-4517 | At Law No. 29375-VA |
| Garland D. Arnold<br>DOB: 3-27-39<br>228-36-5720 | At Law No. 29019-RC |
| Horace H. Arrington<br>DOB: 11-1-40<br>244-50-8765 | At Law No. 29795-VA |
| Larry D. Arrington<br>DOB: 9-27-53<br>216-62-1872 | At Law No. 29319-RW |
| Marcus L. Arthur, Jr.<br>DOB: 2-11-34<br>232-54-5208 | At Law No. 29355-VC |
| Melvin J. Arthur<br>DOB: 3-21-33<br>226-38-2908 | At Law No.: 29948-VC |
| Earl S. Artis<br>DOB: 10-30-40<br>224-50-7315 | At Law No. 28860-VA |

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| Edward J. Artis<br>DOB: 6-7-44<br>227-58-8986 | At Law No. 28009-RW |
| James Artis<br>DOB: 1-14-32<br>243-44-4057 | At Law No. 27882-EH |
| Lee S. Artis<br>DOB: 5-6-34<br>238-54-9663 | At Law No. 27896-RC |
| Melvin Artis<br>DOB: 3-16-55<br>231-82-1367 | At Law No. 28708-VC |
| Alton N. Askew, Sr.<br>DOB: 6-10-32<br>242-42-1732 | At Law No. 29561-RW |
| Curtis Askew<br>DOB: 8-12-54<br>246-72-8531 | At Law No. 29042-VC |
| Howard E. Askew<br>DOB: 9-5-52<br>238-88-4308 | At Law No. 27003-RW |
| Joe Askew, Jr.<br>DOB: 1-30-54<br>246-88-8317 | At Law No. 27948-VC |
| Thornton Askew, Jr<br>DOB: 8-30-44<br>238-70-0277 | At Law No. 27002-RC |
| Wilbert G. Askew<br>DOB: 8-13-45<br>238-76-3947 | At Law No. 27378-EH |
| Thomas L. Atkinson<br>DOB: 12-29-47<br>224-70-0532 | At Law No. 30058-VC |
| Alvin S. Augburn<br>DOB: 4-17-54<br>230-82-9720 | At Law No. 28984-RC |

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| William Augburn, Sr.<br>DOB: 8-8-25<br>232-30-3645 | At Law No. 29113-EH |
| David L. Austin<br>DOB: 3-29-48<br>227-68-2250 | At Law No. 29841-RW |
| James G. Bagby<br>DOB: 12-14-45<br>227-58-5134 | At Law No. 29619-EH |
| Charles W. Bailey<br>DOB: 7-2-42<br>228-54-7793 | At Law No. 28073-RW |
| George H. Bailey<br>DOB: 10-13-42<br>228-56-2308 | At Law No. 29005-VA |
| James R. Bailey<br>DOB: 1-3-37<br>228-38-6454 | At Law No. 29949-RW |
| John L. Bailey<br>DOB: 6-5-22<br>230-22-3032 | At Law No. 27938-VC |
| Lenton S. Bailey<br>DOB: 8-27-35<br>223-44-4613 | At Law No. 28029-RW |
| Michael S. Bailey<br>DOB: 11-26-52<br>226-80-6657 | At Law No. 27472-VA |
| Oakley T. Bailey, Jr.<br>DOB: 7-26-39<br>231-42-7434 | At Law No. 27472A-04 |
| Perry M. Bailey<br>DOB: 3-25-49<br>227-68-5065 | At Law No. 29043-EH |
| Saul J. Bailey<br>DOB: 6-4-28<br>226-34-0024 | At Law No. 28760-RC |

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| Clyde E. Baker<br>DOB: 5-2-48<br>587-16-7198 | At Law No. 28072-RC |
| James O. Baker<br>DOB: 1-15-31<br>229-34-0565 | At Law No. 29002-EH |
| Joseph Baker<br>DOB: 1-8-36<br>256-48-4503 | At Law No. 27982-EH |
| Sylvester Baker<br>DOB: 2-23-36<br>237-52-2826 | At Law No. 27380-VA |
| Virgil L. Baker<br>DOB: 7-6-34<br>229-42-7793 | At Law No. 30021-EH |
| Bruce W. Ball<br>DOB: 12-12-46<br>234-76-1609 | At Law No. 29376-EH |
| Albert L. Ballard<br>DOB: 3-5-45<br>239-70-4726 | At Law No. 28197-RC |
| Tyrone Ballard<br>DOB: 3-15-47<br>223-64-5264 | At Law No. 28039-RC |
| Leroy Bandy<br>DOB: 12-6-25<br>228-12-5323 | At Law No. 29988-VC |
| Robert L. Banks, Sr.<br>DOB: 12-13-47<br>225-62-5799 | At Law No. 29900-RC |
| Spencer N. Banks<br>DOB: 7-10-35<br>228-38-4585 | At Law No. 29756-EH |
| William N. Banks<br>DOB: 1-9-22<br>227-14-7644 | At Law No. 27767-RC |

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| William H. Banks, Jr.<br>DOB: 5-4-42<br>246-64-1346 | At Law No. 28985-VA |
| Donald J. Barclift, Sr.<br>DOB: 10-18-48<br>238-84-5041 | At Law No. 28174-VA |
| Carl F. Barkers<br>DOB: 3-28-43<br>228-58-7340 | At Law No. 29562-VC |
| Arnold W. Barnes<br>DOB: 3-23-51<br>229-76-1474 | At Law No. 30157-EH |
| Norfleet Barnes<br>DOB: 4-28-51<br>404-78-8966 | At Law No. 27756-RC |
| Robert L. Barnes<br>DOB: 4-17-47<br>238-70-4266 | At Law No. 27895-VA |
| Simon Barnes<br>DOB: 1-4-48<br>245-82-8087 | At Law No. 29007-EH |
| James E. Barrell<br>DOB: 12-1-43<br>228-58-5022 | **CLOSED** |
| Tommie L. Barrow<br>DOB: 12-17-51<br>262-04-1475 | At Law No. 29563-VA |
| Rudolph Bass, Jr.<br>DOB: 10-2-47<br>245-78-1305 | At Law No. 28216-VC |
| Edwin Bassett, Jr.<br>DOB: 1-8-19<br>228-01-8758 | At Law No. 28892-EH |
| James F. Batten<br>DOB: 4-25-24<br>224-20-6608 | At Law No. 27670-VC<br>**SETTLED** |

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| George S. Baughans, Sr.<br>DOB: 11-19-32<br>227-32-5671 | At Law No. 27671-RW |
| George S. Baughans, III<br>DOB: 7-20-55<br>227-86-6149 | At Law No. 27672-RC |
| James R. Bazemore, Jr<br>DOB: 3-24-49<br>230-66-7070 | At Law No. 27108-RW |
| Marvin L. Beal<br>DOB: 3-3-29<br>228-20-7870 | At Law No. 30158-RC |
| Robert E. Beane<br>DOB: 10-29-49<br>230-70-6028 | At Law No. 29327-EH |
| Eugene G. Beasley, Jr.<br>DOB: 7-25-52<br>238-86-8856 | At Law No. 28071-VC<br>**SETTLED** |
| Rudolph A. Bell, Jr.<br>DOB: 1-22-44<br>229-56-3206 | At Law No. 30022-RC |
| Johnnie C. Bellamy<br>DOB: 4-13-34<br>239-48-0741 | At Law No. 27131-RC |
| Darnell Belle, Sr.<br>DOB: 4-1-47<br>226-60-5657 | At Law No. 29580-RC |
| Harold P. Belle, Jr.<br>DOB: 8-13-43<br>230-54-7692 | At Law No. 29564-EH |
| Danny D. Belor<br>DOB: 6-8-46<br>223-68-8254 | At Law No. 29320-VC |
| Howard Bennett<br>DOB: 10-20-32<br>246-50-1190 | At Law No. 27089-EH |

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| James A. Bennett, Jr.<br>DOB: 12-25-49<br>238-80-6451 | At Law No. 28561-VA |
| Kenneth G. Benton<br>DOB: 9-16-49<br>225-68-5837 | At Law No. 30059-RW |
| Robert T. Berkley<br>DOB: 1-5-51<br>224-76-2765 | At Law No. 29473-VA |
| Claude Best<br>DOB: 11-10-37<br>246-40-7383 | At Law No. 01-31001-EH |
| Henry L. Beveridge (Dec'd)<br>DOB: 1-15-08<br>DOD: 11-7-97<br>224-50-3470 | At Law No. 27618-VA |
| Henry Biggs, Sr.<br>DOB: 11-20-29<br>240-44-0233 | At Law No. 27735-RC |
| Jimmy N. Biggs<br>DOB: 4-9-46<br>238-76-4857 | At Law No. 30122-EH |
| Leon M. Biggs<br>DOB: 9-29-32<br>237-52-1954 | At Law No. 27990-VA |
| Danridge Billups, Jr.<br>DOB: 6-3-32<br>227-30-8695 | At Law No. 29148-EH |
| Edwin Billups<br>DOB: 3-10-32<br>231-30-4930 | At Law No. 27100-VA |
| Raymond L. Billups, Sr.<br>DOB: 9-9-43<br>227-48-2094 | At Law No. 28742-VA |
| Melvin L. Blacken<br>DOB: 6-18-39<br>224-46-0907 | At Law No. 29377-RC |

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| Gregory Blackwell<br>DOB: 5-22-54<br>230-78-3442 | At Law No. 28748-VC |
| Sherman M Blackwell<br>DOB: 5-5-34<br>239-44-0458 | At Law No. 27617-RC |
| Jessie L. Blain<br>DOB: 4-25-40<br>224-50-9611 | At Law No. 27894-RW |
| William D. Blake<br>DOB: 1-17-50<br>235-82-0097 | At Law No. 30060-VA |
| Vincent B. Blanks<br>DOB: 7-12-37<br>230-44-7542 | At Law No. 28226-VC |
| James F. Blizzards, Sr.<br>DOB: 1-15-17<br>227-03-2182 | At Law No. 27958-VC |
| Jesse L. Blizzard, Jr.<br>DOB: 7-3-34<br>228-38-5271 | At Law No. 28040-VA |
| George L. Blount, Sr.<br>DOB: 3-6-45<br>228-62-2228 | At Law No. 29356-VA |
| Robert E. Blount<br>DOB: 1-25-49<br>246-80-9795 | At Law No. 30061-EH |
| William J. Blount<br>DOB: 12-19-45<br>240-66-4429 | At Law No. 28903-RC |
| Joseph D. Blow<br>DOB: 10-27-44<br>227-66-1495 | At Law No. 29911-VC |
| Harold L. Blowe, Jr.<br>DOB: 1-1-40<br>225-46-0511 | At Law No. 27736-RW |

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| McKenzie Bolden<br>DOB: 9-14-44<br>228-58-5001 | At Law No. 28870-VA |
| Curtis L. Bond<br>DOB: 5-25-48<br>241-80-0421 | At Law No. 28196-VC |
| Edward T. Booker<br>DOB: 3-30-46<br>150-34-7342 | At Law No. 29008-RW |
| Fred Booker<br>DOB: 11-18-44<br>226-56-9528 | At Law No. 29149-RC |
| Bobby E. Boone<br>DOB: 8-10-53<br>244-88-0245 | At Law No. 29016-VC |
| Charlie Boone<br>DOB: 3-23-43<br>230-52-7120 | At Law No. 28709-EH |
| Eugene J. Boone<br>DOB: 11-22-14<br>245-16-5335 | At Law No. 28301-RW |
| Garfield N. Boone<br>DOB: 4-1-46<br>237-78-6219 | At Law No. 29150-RW |
| James L. Boone<br>DOB: 8-13-44<br>230-58-9455 | At Law No. 29226-EH |
| Larry D. Boone<br>DOB: 2-19-50<br>245-84-9980 | At Law No. 29151-VA |
| Stanley Boone<br>DOB: 10-30-31<br>237-46-0532 | At Law No. 28478-EH |
| William T. Boothe<br>DOB: 7-15-26<br>235-34-9397 | At Law No. 28652-VC |

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| Herbert A. Bowe<br>DOB: 11-14-49<br>244-82-7388 | At Law No. 29227-RC |
| William R. Bowen<br>DOB: 12-27-26<br>231-22-3200 | At Law No. 28881-VC |
| Robert L. Bowers<br>DOB: 7-18-53<br>240-80-1245 | At Law No. 29730-VA |
| George Bowman<br>DOB: 4-27-41<br>414-64-0954 | At Law No. 30023-VC |
| William E. Bowser, Sr.<br>DOB: 6-18-46<br>230-64-3839 | At Law No. 28879-RC |
| Christopher C. Boyd, Jr.<br>DOB: 12-22-42<br>223-54-9838 | At Law No. 27768-RW |
| Leman T. Boyd<br>DOB: 5-10-31<br>238-40-8197 | At Law No. 28560-RW |
| Vaughn A. Boyd<br>DOB: 5-6-56<br>229-88-2650 | At Law No. 30132-EH |
| Oscar B. Boykins<br>DOB: 8-19-39<br>227-48-1081 | At Law No. 27226-EH |
| Ray Bracey<br>DOB: 12-28-28<br>229-26-3739 | At Law No. 29901-VC |
| Claud C. Bracy<br>DOB: 6-15-48<br>227-56-3665 | At Law No. 28912-RW |
| Hubert Bradby, Jr.<br>DOB: 10-28-34<br>231-44-7283 | At Law No. 27949-RW |

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| David C. Branch<br>DOB: 1-2-34<br>228-38-3832 | At Law No. 29620-RC |
| Earnest L. Branch<br>DOB: 1-3-27<br>229-26-5297 | At Law No. 28010-VA |
| Oscar D. Brandon, Jr.<br>(Dec'd)<br>DOB: 3-7-47<br>231-58-6762 | At Law No. 29463-VA |
| David M. Brandt<br>DOB: 5-19-50<br>227-70-4471 | At Law No. 29328-RC |
| Edward L. Breggs<br>DOB: 2-22-47<br>432-86-6540 | At Law No. 28746-RW |
| John W. Brewington<br>DOB: 7-13-41<br>226-50-0560 | At Law No. 29379-VC |
| Lewis C. Briggs, Jr.<br>DOB: 7-25-46<br>223-68-1157 | At Law No. 28559-RC |
| Eddie W. Brinkley<br>DOB: 4-1-40<br>229-48-7769 | At Law No. 27176-EH |
| Raymond S. Brinkley<br>DOB: 3-5-48<br>224-70-6024 | At Law No. 29052-VC |
| Arthur B. Bristow, Sr.<br>DOB: 1-1-24<br>226-14-5345 | At Law No. 29656-RW |
| Eddie L. Britt<br>DOB: 1-10-46<br>230-56-0474 | At Law No. 28740-RC |
| James T. Britt, Sr.<br>DOB: 10-10-43<br>230-56-0489 | At Law No. 28778-VC |

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| John Brockington<br>DOB: 4-4-15<br>250-34-2006 | At Law No. 29565-RC |
| Frank Brooks<br>DOB: 12-13-49<br>230-62-5740 | At Law No. 29366-EH |
| James Brooks, Jr.<br>DOB: 11-26-43<br>230-54-9938 | At Law No. 29757-RC |
| Robert J. Brooks<br>DOB: 6-3-34<br>226-36-3316 | At Law No. 27677-RC |
| Wayne J. Brooks<br>DOB: 1-14-46<br>224-64-2706 | At Law No. 29053-EH |
| Eugene Brothers<br>DOB: 12-11-47<br>241-86-9365 | At Law No. 28011-RC |
| James E. Brothers<br>DOB: 1-24-54<br>239-92-3470 | At Law No. 29902-RW |
| Alvin L. Brown<br>DOB: 11-3-53<br>229-82-2570 | At Law No. 29731-EH |
| Daniel Brown<br>DOB: 12-17-43<br>239-66-3294 | At Law No. 29054-RW |
| Elmer J. Brown<br>DOB: 7-9-46<br>224-66-7366 | At Law No. 27644-EH |
| Fred D. Brown<br>DOB: 5-23-20<br>243-18-4681 | At Law No. 29621-RW |
| Herbert Brown, Jr.<br>DOB: 11-19-46<br>230-68-0455 | At Law No. 29803-VC |

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| Hubert Brown<br>DOB: 5-23-27<br>230-22-7270 | At Law No. 30062-RC |
| Huntington A. Brown, Jr.<br>DOB: 10-26-27<br>227-26-9550 | At Law No. 27891-RC |
| Kenneth H. Brown, Sr.<br>DOB: 3-13-29<br>231-20-4854 | At Law No. 29158-EH |
| Krindle Brown<br>DOB: 11-10-45<br>227-56-4547 | At Law No. 29622-VC |
| Lawrence W. Brown<br>DOB: 11-11-25<br>229-16-1922 | At Law No. 28859-RC |
| L. C. Brown<br>DOB: 4-30-30<br>417-32-6107 | At Law No. 27127-RC |
| Leslie Ray Brown<br>DOB: 1-16-54<br>226-78-0699 | At Law No. 29566-RW |
| Lorenzo Brown<br>DOB: 2-28-49<br>224-70-0987 | At Law No. 29758-VC |
| Madison C. Brown<br>DOB: 3-1-43<br>230-56-7553 | At Law No. 28194-VA |
| McOlzer Brown<br>DOB: 5-20-38<br>225-42-5256 | At Law No. 29903-VA |
| Nelson Brown, Sr.<br>DOB: 7-22-26<br>239-32-6288 | At Law No. 27225-VA |
| Richard C. Brown, Sr.<br>DOB: 7-26-38<br>226-48-2096 | At Law No. 29010-VA |

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| Robert M. Brown, Sr.<br>DOB: 1-26-41<br>231-50-2586 | At Law No. 29367-RC |
| Thomas E. Brown<br>DOB: 4-9-93<br>230-38-8932 | At Law No. 27769-EH |
| William R. Brown<br>DOB: 12-12-22<br>231-16-8607 | At Law No. 29567-VC |
| Wyatt C. Brown<br>DOB: 8-14-42<br>227-54-4524 | At Law No. 28759-EH |
| Taft W. Bruce Jr.<br>DOB: 4-23-40<br>226-44-7389 | At Law No. 27643-VA |
| Lee G. Brunson<br>DOB: 11-8-33<br>249-44-9231 | At Law No. 27513-EH |
| Moses H. Brunson<br>DOB: 5-28-48<br>241-78-0572 | At Law No. 27230-EH |
| Benjamin Bryant<br>DOB: 10-30-28<br>220-26-1954 | At Law No. 28215-EH |
| Thomas P. Bryant<br>DOB: 7-29-32<br>229-34-7366 | At Law No. 27390-VA |
| William H. Bryant<br>DOB: 6-17-43<br>223-56-4885 | At Law No. 29009-RC |
| Thomas W. Buchanan<br>DOB: 9-8-32<br>232-52-7736 | At Law No. 29571-RW |

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| Raymond I. Buggs, Jr.<br>(Dec'd)<br>DOB: 5-24-34<br>DOD: 12-26-98<br>226-36-3693 | At Law No. 27910-VA |
| Clinton L. Bullock<br>DOB: 8-9-52<br>227-70-4626 | At Law No. 29623-VA |
| Milton R. Bullock<br>DOB: 2-13-40<br>229-52-4198 | At Law No. 29568-VA |
| Carl D. Bunn<br>DOB: 4-29-26<br>226-60-6481 | At Law No. 30024-RW |
| Jeremiah Bunn<br>DOB: 8-24-38<br>224-50-7626 | At Law No. 30167-EH |
| Linwood C. Bunn<br>DOB: 12-10-52<br>241-90-9855 | At Law No. 28819-VA |
| Charles P. Burden<br>DOB: 5-31-50<br>246-84-8146 | At Law No. 29989 |
| Curtis N. Burley<br>DOB: 7-2-44<br>226-54-8214 | At Law No. 28979-RC |
| James E. Burrell<br>DOB: 12-1-43<br>228-58-5022 | At Law No. 29087-EH |
| Gerald K. Burris<br>DOB: 11-26-39<br>227-48-2163 | At Law No. 28776-RW |
| William W. Burton<br>DOB: 3-7-30<br>231-28-2542 | At Law No. 27837-RC |

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| Joseph L. Bush<br>DOB: 1-22-36<br>244-48-9956 | At Law No. 27757-VA |
| James W. Bushnell, Sr.<br>DOB: 7-30-41<br>241-66-9267 | At Law No. 27130-EH |
| Arnold F. Butler<br>DOB: 10-19-47<br>232-78-0210 | At Law No. 28245-EH |
| Charles M. Butler<br>DOB: 3-21-45<br>228-60-8730 | At Law No. 29732-RC |
| Frederick L. Butler<br>DOB: 6-16-40<br>227-52-7385 | At Law No. 28683-EH |
| Henry P. Butler<br>DOB: 10-12-28<br>239-38-0313 | At Law No. 29474-EH |
| John Butler, Sr.<br>DOB: 10-8-17<br>250-03-0949 | At Law No. 28249-VA |
| James L. Butler<br>DOB: 2-28-28<br>253-32-4225 | At Law No. 28810-VC |
| Nathaniel Butler<br>DOB: 11-30-35<br>421-42-7854 | At Law No. 29548-VA |
| Dwight L. Butts<br>DOB: 8-12-43<br>226-56-7673 | At Law No. 28542-VC |
| James H. Butts<br>DOB: 5- 6-35<br>225-46-5124 | At Law No. 28177-RC |
| Arthur L. Byrd, Sr.<br>DOB: 10-4-44<br>226-58-1440 | At Law No. 27228-RW |

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| Major H. Byrd, Jr.<br>DOB: 12-20-51<br>231-72-6142 | At Law No. 28861-VC |
| Sherman D. Byrd<br>DOB: 1-15-45<br>224-56-4092 | At Law No. 30031-EH |
| Jannings B. Caldwell<br>DOB: 12-1-47<br>230-64-4190 | At Law No. 29904-EH |
| James H. Call, Jr.<br>DOB: 9-2-32<br>230-36-8740 | At Law No. 29614-EH |
| Kenny Campbell<br>DOB: 11-22-48<br>238-78-1938 | At Law No. 28747-VA |
| William H. Camper<br>DOB: 7-7-21<br>230-32-9862 | At Law No. 29705-VA |
| William L. Canady<br>DOB: 9-21-46<br>226-62-2315 | At Law No. 27363-RC |
| Leroy Capehart<br>DOB: 6-25-31<br>231-26-9987 | At Law No. 29733-VC |
| Alphonsa L. Cargill<br>DOB: 5-6-48<br>223-64-5467 | At Law No. 29124-RC |
| Frank H. Carney, Jr.<br>DOB: 8-4-43<br>226-58-2190 | At Law No. 30168-RC |
| Luke Carpenter, Sr.<br>DOB: 3-31-42<br>230-52-1573 | At Law No. 28479-RC |
| John J. Carrington<br>DOB: 3-11-40<br>228-52-2160 | At Law No. 27758-RW |

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| Charles A. Carrithers, Jr.<br>DOB: 6-6-42<br>230-56-7799 | At Law No. 30025-VA |
| Calvin L. Carter<br>DOB: 4-5-48<br>242-84-6017 | At Law No. 27235-RW |
| James R. Carter<br>DOB: 4-29-47<br>240-72-5025 | At Law No. 29569-EH |
| Wilson B. Carter<br>DOB: 7-15-42<br>230-54-9382 | At Law No. 29464-EH |
| Daniel W. Cartwright<br>DOB: 10-18-45<br>214-44-9311 | At Law No. 28535-RW |
| Joseph A. Casey, Sr.<br>DOB: 9-13-38<br>224-50-8855 | At Law No. 27303-VA |
| George W. Cash<br>DOB: 2-22-41<br>223-52-9596 | At Law No. 28242-RC |
| Clyde D. Castle<br>DOB: 1-8-39<br>236-60-7362 | At Law No. 28223-RW |
| John E. Catlett, Sr.<br>DOB: 12-22-47<br>226-62-0309 | At Law No. 27770-VC |
| Bobby L. Chaffin, Sr.<br>DOB: 1-18-32<br>227-40-1476 | At Law No. 28515-RW |
| Melvin R. Chamblee<br>DOB: 4-19-39<br>238-64-8575 | At Law No. 27950-VA |
| Samuel O. Chamblee<br>DOB: 2-12-35<br>243-50-2334 | At Law No. 28019-RW |

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| Marshall E. Chapman, Sr.<br>DOB: 8-17-39<br>226-44-6371 | At Law No. 30032-RC |
| William H. Chapman<br>DOB: 7-5-33<br>424-38-2589 | At Law No. 29465-RC |
| James Charity<br>DOB: 11-30-41<br>230-52-9501 | At Law No. 29581-RW |
| Waverly A. Charity<br>DOB: 8-12-48<br>230-68-1170 | At Law No. 29097-EH |
| Harry J. Charnock<br>DOB: 2-18-45<br>231-58-8014 | At Law No. 29624-EH |
| Willie E. Chatman, Sr.<br>DOB: 9-21-30<br>231-38-1668 | At Law No. 29267-EH |
| Robert L. Cheek, Jr.<br>DOB: 6-5-39<br>238-56-1192 | At Law No. 27006-RC |
| Louis E. Cherry<br>DOB: 2-5-47<br>242-78-8580 | At Law No. 28758-VC |
| William Cherry, Jr.<br>DOB: 10-9-48<br>243-84-7895 | At Law No. 28777-VA |
| Howard O. Christian<br>DOB:11-22-31<br>223-36-7686 | At Law No. 27300-VC |
| John E. Christian, Jr.<br>DOB: 5-4-36<br>228-40-4063 | At Law No. 28665-RW |
| Robert A. Christian, Jr.<br>DOB: 3-21-43<br>226-56-9708 | At Law No. 27999-RW |

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| Addison J. Claiborne, Jr.<br>DOB: 4-3-47<br>225-72-6728 | At Law No. 30133-RC |
| Andrew G. Claiborne<br>DOB: 9-11-45<br>223-54-6712 | At Law No. 29950-VA |
| Charles H. Clark Sr.<br>DOB: 5-12-24<br>224-12-2546 | At Law No. 27301-RW |
| Clyde Clark<br>DOB: 2-14-48<br>230-62-5056 | At Law No. 28695-RW |
| James C. Clark<br>DOB: 3-7-20<br>245-16-3452 | At Law No. 29628-VA |
| Morris Clark<br>DOB: 8-2-37<br>241-62-6418 | At Law No. 27483-EH |
| Lorenzo Clayborne<br>DOB: 8-9-53<br>229-76-7523 | At Law No. 27383-EH |
| Armstead Clayton, Jr.<br>DOB: 7-15-50<br>224-70-0932 | At Law No. 30026-EH |
| Haywood Clayton<br>DOB: 2-25-53<br>224-76-3200 | At Law No. 30134-VC |
| Randolph G. Clemm<br>DOB: 9-28-47<br>223-68-8342 | At Law No. 29706-EH |
| Douglas H. Clemmons<br>DOB: 10-4-43<br>224-56-3034 | At Law No. 29088-RC |
| James E. Cofield<br>DOB: 1-30-44<br>226-50-1031 | At Law No. 29114-RC |

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| Leroy Coleman<br>DOB: 3-25-43<br>224-58-4760 | At Law No. 29115-RW |
| Leslie Coleman, Jr.<br>DOB: 12-12-41<br>428-88-2825 | At Law No. 28978-RW |
| Willie E. Coleman<br>DOB: 8-6-45<br>231-58-7025 | At Law No. 29055-RC |
| James D. Collins<br>DOB: 2-22-37<br>244-52-6407 | At Law No. 27983-VC |
| Lindon R. Collins<br>DOB: 5-15-48<br>220-52-2452 | At Law No. 27129-VA |
| Perry D. Collins<br>DOB: 11-27-28<br>239-32-6423 | At Law No. 29056-VA |
| Elton I. Cook<br>DOB: 2-29-52<br>227-68-0693 | At Law No. 27737-VA |
| Johnny L. Cook<br>DOB: 6-6-50<br>228-64-5980 | At Law No. 28976-VC |
| William L. Cooke, Sr.<br>DOB: 5-30-49<br>224-70-2450 | At Law No. 27178-RW |
| James E. Cooper<br>DOB: 6-3-15<br>246-14-6819 | At Law No. 27991-RC |
| John W. Cooper<br>DOB: 7-18-41<br>244-68-5600 | At Law No. 28200-EH |
| Reuben N. Cooper, III<br>DOB: 6-30-43<br>238-70-0617 | At Law No. 29044-RW |

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| Raymond L. Copeland<br>DOB: 3-22-44<br>223-54-5421 | At Law No. 28696-VA |
| Robert L. Copeland, Sr.<br>DOB: 4-25-47<br>244-78-8653 | At Law No. 28020-VA |
| Oscar Coppedge<br>DOB: 7-1-21<br>237-24-5350 | At Law No. 29033-EH |
| James E. Coston, Sr.<br>DOB: 9-16-42<br>227-48-1972 | At Law No. 28516-VA |
| Joseph C. Cotton (Dec'd)<br>DOB: 4-22-33<br>238-38-7530 | At Law No. 28177-RC |
| Lemuel E. Cotton<br>DOB: 2-25-42<br>240-68-2185 | At Law No. 28913-RC |
| Edward J. Cowan<br>DOB: 12-20-43<br>240-68-0775 | At Law No. 28882-EH |
| Roosevelt E. Crawley, Jr.<br>DOB: 4-8-39<br>231-44-2552 | At Law No. 29057-VC |
| Charles L. Crist<br>DOB: 7-10-41<br>223-66-1652 | At Law No. 27269-EH |
| Alex Crocker<br>DOB: 3-14-45<br>226-60-1737 | At Law No. 28558-EH |
| Thomas L. Crocker<br>DOB: 6-2-34<br>224-38-8900 | At Law No. 27781-VC |
| Charles H. Crockett, Jr<br>DOB: 8-10-44<br>228-58-5587 | At Law No. 27087-RW |

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| Alfred M. Cross<br>DOB: 7-31-50<br>231-72-2403 | At Law No. 29257-EH |
| Minnie G. Crumpler<br>DOB: 8-27-30<br>246-38-2005 | At Law No. 29380-VA |
| Sterling L. Crutchfield, Sr.<br>DOB: 3-31-45<br>227-58-0658 | At Law No. 28669-RC |
| Cornelius R. Cruz, Jr.<br>DOB: 1-7-46<br>230-56-9186 | At Law No. 29734-RW |
| James M. Cutler<br>DOB: 6-4-35<br>229-44-4870 | At Law No. 29116-VA |
| Dennis F. Daggs<br>DOB: 6-12-48<br>414-80-9849 | At Law No. 29215-VC |
| Henry K. Daggs<br>DOB: 12-23-37<br>411-54-6943 | At Law No. 29475-RC |
| Philip Dance<br>DOB: 5-15-42<br>240-66-7642 | At Law No. 29098-RC |
| Marvin S. Dancy<br>DOB: 7-25-41<br>226-58-2053 | At Law No. 29258-RC |
| William Dancy<br>DOB: 1-26-40<br>238-64-6810 | At Law No. 29590-RC |
| Floyd C. Daniels<br>DOB: 8-23-45<br>226-60-5584 | At Law No. 29905-RC |
| Toussaint Daniels, Jr.<br>DOB: 5-15-49<br>246-78-4836 | At Law No. 28224-VA |

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| Wendell Daniels<br>DOB: 6-10-44<br>245-72-0491 | At Law No. 28902-RW |
| George K. Darden<br>DOB: 7-4-46<br>238-72-9551 | At Law No. 28986-VC |
| James L. Davender<br>DOB: 7-18-18<br>246-18-1643 | At Law No. 29045-RC |
| Earl B. Davenport, Sr.<br>DOB: 5-2-43<br>223-54-9823 | At Law No. 27984-RW |
| Andre P. Davis, Sr.<br>DOB: 10-30-47<br>227-68-0288 | At Law No. 28684-RC |
| Delano R. Davis<br>DOB: 1-20-39<br>230-44-8880 | At Law No. 28775-RC |
| Donald M. Davis<br>DOB: 1-3-55<br>224-76-4025 | At Law No. 29466-RW |
| George A. Davis, Jr.<br>DOB: 8-7-41<br>230-52-7784 | At Law No. 29906-VC |
| Harrison P. Davis<br>DOB: 5-9-26<br>246-22-3028 | At Law No. 28711-RW |
| Haywood Davis<br>DOB: 3-23-51<br>228-78-1620 | At Law No. 29582-VC |
| Henry Davis<br>DOB: 7-2-31<br>238-46-8914 | At Law No. 29046-VA |
| James H. Davis<br>DOB: 5-4-15<br>239-22-3217 | At Law No. 28693-EH |

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| Plummer Davis, Jr.<br>DOB: 12-10-49<br>230-64-3937 | At Law No. 29357-EH |
| Robert L. Davis<br>DOB: 7-7-23<br>225-28-8481 | At Law No. 27883-VC |
| Ronnie Davis, Sr.<br>DOB: 5-13-52<br>223-76-5211 | At Law No. 29358-RC |
| Stanley Davis<br>DOB: 4-16-33<br>423-42-7936 | At Law No. 28670-RW |
| William Davis<br>DOB: 5-3-29<br>244-48-3929 | At Law No. 28536-VA |
| Willie R. Davis<br>DOB: 3-7-27<br>240-44-4019 | At Law No. 28935-VA |
| Orlanda Deans<br>DOB: 1-1-33<br>237-50-4844 | At Law No. 27387-VC |
| Calvin DeBrew<br>DOB: 5-15-48<br>227-66-1328 | At Law No. 29216-EH |
| Larry K. Debrew<br>DOB: 7-8-54<br>227-84-0278 | At Law No. 29381-EH |
| Thurman E. Debraux<br>DOB: 11-8-51<br>223-78-2219 | At Law No. 30027-RC |
| James T. Debroux<br>DOB: 4-10-32<br>238-40-9959 | At Law No. 28021-RC |
| William B. Deckard<br>DOB: 11-21-44<br>231-60-1831 | At Law No. 29368-RW |

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| Ernest J. Deel<br>DOB: 12-5-33<br>234-48-9767 | At Law No. 27362-EH |
| Wallace Delk<br>DOB: 2-9-46<br>227-62-8682 | At Law No. 27959-RW |
| Donald Deloatch<br>DOB: 3-20-39<br>239-66-4619 | At Law No. 29630-RC |
| Lee A. Deloatch<br>DOB: 11-12-20<br>225-28-4797 | At Law No. 28820-VC |
| Michael V. Deloatch, Sr.<br>DOB: 7-2-49<br>230-64-4032 | At Law No. 29228-RW |
| Daniel W. Dennis, Jr.<br>DOB: 4-9-43<br>226-54-7937 | At Law No. 27312-VA |
| George H. Dennis, Jr.<br>DOB: 10-29-48<br>223-68-8705 | At Law No. 29583-VA |
| Roy Denson<br>DOB: 6-28-44<br>227-52-5102 | At Law No. 29217-RC |
| Sylvanious Denson, Jr.<br>DOB: 4-9-43<br>231-50-0103 | At Law No. 29259-RW |
| Roy M. Deuell<br>DOB: 1-9-33<br>226-38-2907 | At Law No. 29382-RC |
| Arlander Dew<br>DOB: 9-25-24<br>243-20-3772 | At Law No. 29345-VC |
| James M. Dickens<br>DOB: 5-8-40<br>241-64-7475 | At Law No. 28514-RC |

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| Moses D. Dickens<br>DOB: 2-20-43<br>241-64-7430 | At Law No. 28246-VC |
| Calvin Dickerson<br>DOB: 7-12-20<br>229-22-6852 | At Law No. 27911-RC |
| Larry Dickerson<br>DOB: 10-13-53<br>231-84-2773 | At Law No. 29629-EH |
| Willis R. Diggs<br>DOB: 5-7-27<br>229-26-2766 | At Law No. 29359-RW |
| James H. Dillard<br>DOB: 3-7-35<br>227-42-7579 | At Law No. 30033-VC |
| Samuel Dillard Jr.<br>DOB: 5-7-44<br>248-70-7211 | At Law No. 27358-RC |
| Harry E. Dixon<br>DOB: 6-17-46<br>226-56-9316 | At Law No. 29907-RW |
| Richard E. Dixon, Sr.<br>DOB: 1-27-48<br>224-70-2131 | At Law No. 29047-VC |
| Thomas D. Doggette<br>DOB: 12-29-31<br>231-42-7180 | At Law No. 27341-EH |
| James S. Dortch, Jr.<br>DOB: 4-16-44<br>238-68-7745 | At Law No. 29549-EH |
| John T. Drake<br>DOB: 2-26-49<br>238-80-6788 | At Law No. 28030-VA |
| A. L. Drew<br>DOB: 2-2-48<br>224-66-5089 | At Law No. 28774-EH |